1994

Carolyne Joan Sigg v. Henry Alfred Sigg: Brief of Appellant

Utah Court of Appeals

Dean R. Andreasen; Campbell, Maack and Sessions; Attorney for Respondent.
E. Paul Wood, Esq.; Littlefield and Peterson; Attorney for Appellant.

IN AND FOR THE STATE OF UTAH COURT OF APPEALS

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CAROLYNE JOAN SIGG,	:	
	:	**BRIEF OF APPELLANT**
Plaintiff/Appellant,	:	
	:	
v.	:	
	:	
HENRY ALFRED SIGG,	:	
	:	
Defendant/Respondent.	:	Case No. 940650-CA
	:	Priority No. 4

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Appeal from a final Order in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge presiding.

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this matter pursuant to §78-2a-3(2)(i) Utah Code Annotated (as amended, 1992) as an Appeal from final Orders granting a Petition for Modification of a Divorce Decree in the Third Judicial District Court.

ISSUES PRESENTED FOR REVIEW

1. Should the Findings of Fact relative to a "change in circumstances" and "the best interests of the children" be set aside as not reflecting the weight of evidence or a mistake having been made. The Findings of Fact will be set aside only if they are clearly erroneous, meaning that they are in conflict with the clear weight of evidence, or if the Court of Appeals has a "definite and firm conviction that a mistake has been made." Jense v. Jense, 784 P.2d 1249, 1251 (Utah App. 1989); Hagan v. Hagan, 810 P.2d 478, 481 (Utah App. 1991); Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991).

2. Did the Trial Court abuse its discretion in concluding that a change of circumstances occurred and the best interests of the children would be served by changing permanent custody. Conclusions of Law will be reviewed by the Court of Appeals on a correction of error standard, affording no particular deference to the Trial Court. State v. Bobo, 803 P.2d 1268, 1271-72 (Utah App. 1990). A Trial Court's decision concerning modification of a Decree of Divorce will not be disturbed absent an abuse of discretion. Myers v. Myers, 768 P.2d 979, 984 (Utah App. 1989); Cummings v. Cummings, 821 P.2d 472 (Utah App. 1991).

3. Did the Trial Court abuse its discretion by Ordering Carolyne Sigg to pay Henry Sigg's attorney's fees regarding the Petition for Modification. A correction of error standard affording no

particular deference to the Trial Court is used in reviewing Conclusions of Law by the Court of Appeals. State v. Bobo, supra. A Trial Court's decision concerning modification of a Decree of Divorce will not be disturbed absent an abuse of discretion. Myers v. Myers, supra.; Cummings v. Cummings, supra.

4. Did the Trial Court abuse its discretion by Ordering Carolyne Sigg to pay Henry Sigg's attorney's fees and related expenses of a Colorado criminal action. State v. Bobo, supra. A Trial Court's decision concerning modification of a Decree of Divorce will not be disturbed absent an abuse of discretion. Myers v. Myers, supra.; Cummings v. Cummings, supra.

5. Did the Trial Court abuse its discretion by Ordering Carolyne Sigg to pay all of the custody evaluator's fee. State v. Bobo, supra. A Trial Court's decision concerning modification of a Decree of Divorce will not be disturbed absent an abuse of discretion. Myers v. Myers, supra.; Cummings v. Cummings, supra.

6. Did the Trial Court abuse its discretion by arbitrarily Ordering Carolyne Sigg to be solely responsible for one-third of her day care costs and equally dividing the balance between the parties. State v. Bobo, supra. A Trial Court's decision concerning modification of a Decree of Divorce will not be disturbed absent an abuse of discretion. Myers v. Myers, supra.; Cummings v. Cummings, supra.

7. Should the Findings of Fact regarding cohabitation be set aside as not reflecting the weight of evidence or showing a clear mistake has been made. The Findings of Fact will be set aside only if they are clearly erroneous, meaning that they are in conflict with the clear weight of evidence, or if the Court of Appeals has a "definite and

firm conviction that a mistake has been made." Jense v. Jense, supra.; Hagan v. Hagan, supra; Crouse v. Crouse, supra.

8. Did the Trial Court abuse its discretion by terminating alimony in February, 1993, based upon Carolyne Sigg's alleged "cohabitation". State v. Bobo, supra. A Trial Court's decision concerning modification of a Decree of Divorce will not be disturbed absent an abuse of discretion. Myers v. Myers, supra.; Cummings v. Cummings, supra.

9. Did the Trial Court abuse its discretion by not granting Appellant's Motion to Continue Trial based upon late filing of the custody evaluation. A Motion to Continue Trial was made June 14, 1994, (Rec. 633-634) a Motion to Continue Trial and Objection to the Trial Proceeding was made at Trial and denied (Tr. 4; 78)*. The Court of Appeals will review the denial of the Motion on a "prejudicial error" standard. Yates v. Superior Court, 586 P.2d 887 (Ariz. App. 1978)

* For purposes of this Brief, reference to the abbreviation "Tr." shall mean the page number of the Transcript of Hearing, June 14-15, 1994, and reference to the abbreviation "Rec." shall mean the page number of the general record from the Third District Court.

STATEMENT OF CASE

A Decree of Divorce was entered April 7, 1991, divorcing Carolyne and Henry Sigg. (Rec. 356-66; Addendum, Ex. 1). Henry Sigg filed a Petition for Modification on November 24, 1993. (Rec. 475-89) On January 12, 1994, Carolyne Sigg filed an Order to Show Cause relating to Henry Sigg's failure to make required payments under the Decree of Divorce (Rec. 574-75) which was granted in part by Order dated May 12, 1994, which further reserved the issue of alimony, day care expenses, travel costs, attorney's fees, and contempt for Trial. (Rec. 623-25) On January 19, 1994, Henry Sigg moved for temporary orders pending

trial, including appointment of a custody evaluator, which was granted in part on February 15, 1994, reserving for Trial issues terminating alimony, contempt and attorney's fees. (Rec. 579-84) The parties conducted Discovery. On April 24, 1994, the Court scheduled trial for June 14, 1994. (Rec. 604-05) On June 9, 1994, Carolyne Sigg moved to continue the trial setting based upon not having received the custody evaluation and Discovery. (Rec. 633-34; Addendum, Ex.2) After a two day Trial, June 14-15, 1994, before the Honorable David S. Young, the Court entered Findings of Fact and Conclusions of Law (Rec. 671-690; Addendum, Ex.3) on September 29, 1994 which modified the Decree of Divorce transferring custody of the two minor children from Carolyne Sigg to Henry Sigg, terminating alimony based upon cohabitation, awarding Henry Sigg $14,000 in attorney's fees for the modification proceeding, $1,000 in attorney's fees and other expenses incurred by Henry Sigg in a Colorado criminal action, Ordering Carolyne Sigg to pay all of the custody evaluator's fee in excess of $3,000 and granting Carolyne Sigg's Order to Show Cause to the extent of a portion of the day care fee. An amended Decree of Divorce was entered September 29, 1994. (Rec. 693-700; Addendum, Ex.4) Notice of Appeal was filed October 26, 1994.

FACTS

1. Henry and Carolyne Sigg were married September 8, 1984, at her parent's home in Auckland, New Zealand. (Tr.238)

2. The Sigg's daughter Nicola was born March 4, 1985; Carolyne Sigg has been her primary care taker since birth. (Tr.238-239)

3. The Sigg's daughter Lindsay was born January 6, 1989; Carolyne Sigg has been her primary care taker since birth. (Tr. 239) Three days after Lindsay's birth, Henry Sigg left on a ten (10) day

river trip. (Tr.240) Since the parties final separation in July, 1990, Carolyne Sigg has been Lindsay and Nicola's primary custodial parent.

4. Henry Sigg physically abused Carolyne Sigg both during and after their marriage and separation. (Tr.245)

5. In January 1991, the Park City Attorney filed assault and battery charges against Henry Sigg after he attacked his wife. (Tr.246)

6. Henry Sigg regularly yelled at Carolyne Sigg, used foul and abusive language both during and after their marriage (Tr.245) and has threatened Carolyne Sigg on several occasions (Tr.247).

7. Carolyne Sigg has seen Henry Sigg use cocaine and marijuana (Tr.242) and Henry Sigg has admitted to being a recreational drug user prior to their divorce. (Tr.243) Carolyne Sigg believes this was the primary reason for the divorce. (Tr.244) Henry Sigg denies currently using drugs (Tr.346).

8. Carolyne Sigg is and was physically afraid of Henry Sigg based upon his physical abuse and verbal menacing. (Tr.247)

9. After a two (2) day trial, the parties were divorced April 7, 1991. The Decree of Divorce, (record 356-366; Addendum Ex.1) awards Carolyne Sigg permanent custody of the parties' daughters, Nicola and Lindsay, and in pertinent part states:

> "2. The Plaintiff is awarded the permanent care, custody and control of the minor children of the parties. There shall be reserved in the Defendant reasonable rights of visitation which will be consistent with those rights of visitation which have been exercised by the Defendant during the pendency of these proceedings, every other weekend, every Tuesday and Thursday evening, and such other times as the parties may agree. In the event the Plaintiff should elect to reside in New Zealand or elsewhere outside of the state of Utah, the Defendant shall be entitled to exercise extended visitation for up to sixty (60) days each year, which visitation shall take into consideration the children's school schedules. If the Defendant does

exercise extended visitation because of Plaintiff's move as herein set out, the Defendant is entitled to exercise visitation in two separate segments, at his option.

3. In the event the Plaintiff does not move outside the state of Utah, the Defendant shall be entitled to four weeks of visitation during the summer for the purpose of exercising vacation. In the event the Defendant does not exercise vacation during the summer, the Plaintiff shall have rights of visitation with the children which are reciprocal to those herein reserved in the Defendant. If the Defendant does elect to take vacation with the children during extended visitation, he shall not take the children outside of the United States without the Plaintiff's consent. The Plaintiff shall not unreasonably withhold her consent, and if she does, the matter may be submitted to the Court for determination.

4. The parties shall freely and openly communicate regarding actions to be taken in the best interests of the children. There shall be reserved in the Defendant the right to receive and review the schooling and academic records of the children, all medical and dental records, all social and religious records of importance. In those instances where duplicate records are not provided by the children's school of medical provider, the Plaintiff will forward copies of those records to the Defendant, such as the children's report cards and parent-teacher conferences and other regularly scheduled school activities of the children. The parties shall take no action to interfere in the enhancement of the other's relationship with the children, nor any action which may be construed in any respect as derogatory toward the other parent in that relationship. In the accommodation and exercise of visitation, the parties will take into the consideration of the children's needs to be in attendance at activities and shall give close attention to those activities and facilitate the children's participation therein.

5. The Defendant shall pay to the Plaintiff $344 per month per child as child support for a total of $688 per month. Child support will be paid in one lump sum on or before the 5th day of each month through the Clerk of the Court. Child support shall be paid by the Defendant until such time as the minor children reach the age of eighteen (18) or graduate from high school with their normal graduating class, whichever shall occur later.

> 8. The Defendant shall pay to the Plaintiff the sum of $500 per month as and for alimony, which alimony shall terminate as provided by law or upon further Order of this Court. Alimony is to be paid in one lump sum on or before the 5th day of each month through the Clerk of the Court."

10. After the divorce, Carolyne Sigg resided in Park City where visitation regularly occurred according to the Decree. (Tr.246-247)

11. The Divorce Decree contemplates that Carolyne Sigg may return to New Zealand either for a visit or to permanently live, or she may reside outside of the state, in which case Henry Sigg is granted "sixty (60) days visitation each year".

12. Henry Sigg married Amy Wilking, with whom he had an affair, shortly after the divorce.

13. In the summer of 1991, Carolyne Sigg listed her home for sale and informed Henry Sigg she planned eventually to return to New Zealand. (Tr.247-248) A large sign was posted in front of her house indicating that it was for sale.

14. The home sold in August, 1992. In the weeks immediately preceding the sale, Carolyne Sigg discussed with Henry Sigg closing dates for the home sale and informed Henry Sigg that, as soon as the house was sold, she would travel to Boulder, Colorado, Disneyland, and then to visit her parents in New Zealand. (Tr.249; 318-320) Henry Sigg was aware of where Carolyne Sigg's parents resided in Auckland, Australia and had her parents telephone number. (Tr.320)

15. Henry Sigg testified that Carolyne Sigg never informed him she was returning to New Zealand with the children after sale of the home (Tr.29-30; 175-176) and the first time he discovered her whereabouts was by telephoning Vic Haynes in Boulder, Colorado. (Tr.39)

A man with whom Carolyne Sigg had stayed 5-6 days prior to travelling to New Zealand. (Tr. 223-24)

16. Henry Sigg called Carolyne Sigg at her parent's home in Auckland, New Zealand within five to fifteen minutes of her initial arrival. (Tr.39; 250) Henry Sigg knew of the location of her parent's home. (Tr.178-179)

17. According to Carolyne Sigg, she told Henry Sigg that she would be in New Zealand until New Years 1992, and wanted the children to get acquainted with her parents and make decisions about future. (Tr.250)

18. Henry Sigg testified that he indicated he would be coming to New Zealand and Carolyn Sigg replied that he would not be welcome. (Tr.40)

19. Carolyn Sigg testified that subsequent to her arrival in New Zealand, her daughters telephoned Henry Sigg every other week and he telephoned them on alternative weeks and Nicola and Lindsay often wrote him letters. (Tr.250-251) Henry Sigg denies the frequency of the contact and only admits talking with the daughters two to three times and receiving letters from them. (Tr.181)

20. Henry Sigg indicated he would come to New Zealand first in September, then in October, and finally in November, but never stated a specific date for his arrival. (Tr.251) Ms. Sigg recalls discussing Christmas visitation with Mr. Sigg and discussing other visitation by telephone with Mr. Sigg. (Tr.326)

21. Ms. Sigg resided with her parents for eight (8) weeks then moved to an apartment approximately 100 yards from her parent's residence in Auckland, New Zealand. (Tr.252; 321)

22. Henry Sigg arrived in New Zealand on November 4, 1992 and stayed five (5) weeks; the purpose of his trip was to affect visitation with his children. (Tr.40-41)

23. When Henry Sigg arrived in New Zealand, Carolyn Sigg was on a trip with her father. (Tr.252) Ms. Sigg testified Henry Sigg did not contact her for visitation with the children but had hired an attorney prior to leaving the United States who filed a legal action against her. (Tr.255; 181-182)

24. Mr. Sigg testified he had to hire a private investigator to locate Carolyn Sigg and his children since he did not know their whereabouts after they moved from her parent's home. (Tr.181) Carolyne's mother told Henry Sigg they moved and left no forwarding address.

25. Mr. Sigg alleged that he tried to contact Carolyn Sigg when he arrived but she would not communicate with him; as a result, he hired an attorney to enforce the Divorce Decree under The Hague Convention. (Tr.42-43)

26. As a result of the legal action, Carolyn Sigg hired an attorney and subsequently sought assistance from a Mediator to facilitate visitation. (Tr.253; 321-324) Carolyn Sigg requested supervised visitation because Henry Sigg had previously threatened to kidnap the children (Tr.254; 324-325) supervised visitation occurred for a period of two hours. (Tr.44-45)

27. No visitation occurred again because Henry Sigg got angry at Carolyne Sigg while on a second visit and came across the table at Carolyn Sigg; the Mediator asked her to leave. (Tr.253,254; 45)

28. The New Zealand Court held that there had been no violation of the Utah Divorce Decree by Carolyn Sigg (Tr.44; 183) and on

the day of the Court hearing, Mr. Sigg voluntarily departed New Zealand without notice.

29. Vic Haynes visited Carolyn Sigg in New Zealand around Christmas. (Tr.326)

30. Carolyn Sigg returned to Boulder, Colorado on February 7, 1993; Lindsay and Nicola called their father on February 10, and February 14, 1993. Carolyn Sigg provided Henry Sigg with the telephone number where she and the children could be reached in Boulder, Colorado. (Tr.255)

31. Carolyn Sigg stayed at Vic Haynes house for the first two weeks in Boulder, Colorado, then moved to her own condominium (Tr.256). Carolyn Sigg gave Henry Sigg the telephone number and address of her condominium when she moved. The only phone in the home was her private line and she maintained no telephone answering machine, made no restrictions on when her children could talk with Henry Sigg and she occasionally spoke with Henry Sigg. (Tr.256; 187) Carolyn Sigg resided in her condominium for six (6) months from the end of February 1993, to the end of August 1993. (Tr.261)

32. Regarding Nicola's school activities, during 1993, Mr. Sigg attended her baseball games, a school event entitled "Hawaii Day" and a year end concert. However, Mr. Sigg testified that Carolyn Sigg did not inform him of his daughter's school activities. (Tr.194-197)

33. During the spring of 1993, Henry Sigg had the following visitation with Nicola and Lindsay: March 19-28; April 15-20; and May 28-June 2. (Tr.92; 257-259) On all three occasions, Henry Sigg returned the girls late, sometimes up to two (2) days. (Tr.257-258)

34. Carolyn Sigg testified that Henry Sigg does not notify her when he is returning the children in an untimely manner. (Tr. 192-

194) Henry Sigg testified he always calls her if he is returning the girls late.

35. During the summer of 1993, Henry Sigg had visitation for sixty-five (65) days through August 28, 1993, consistent with the visitation award contained in paragraph 2 of the Divorce Decree. (Tr.50; 259)

36. Since April 7, 1991, Henry Sigg has always received visitation granted by the Decree of Divorce and Carolyn Sigg has not been in violation of any Court Ordered visitation. (Tr.125; 259)

37. During the summer of 1993, Henry Sigg arranged a visit with his family in Cape Cod; he testified that he requested that the children be returned five (5) days later than his sixty (60) days visitation, on August 28, and Carolyn Sigg refused to agree with the extended visitation. (Tr.49-53) Mr. Sigg further testified he provided Carolyn Sigg with an itinerary and telephone number where they could be reached. He returned the children five (5) days later than the scheduled visitation.

38. Regarding the Cape Cod visit, Carolyn Sigg testified that Henry Sigg had not told her of the Cape Cod excursion but she had learned of the trip through her daughter and she had received no request from Henry Sigg to return them late. (Tr.259-260) Carolyn Sigg testified she received no telephone number or address for the children in Cape Cod and did not know the children would be returning late until two to three days after the scheduled visitation; as a result, she contacted the Boulder Police. (Tr.260; 327-330)

39. Mr. Sigg testified he has received only sporadic reports from the children's school in Boulder, Colorado; no notices of parent-teacher conferences; and only invoices from medical and dental health

care providers. (Tr.31-34) Carolyn Sigg testified that Nicola and Lindsay are quite healthy and rarely, if ever, need any medical assistance. (Tr.276)

40. In August 1993, prior to the children's return home from the extended visit with their father, Carolyn Sigg and Vic Haynes purchased a home together in Boulder, Colorado. (Tr.261)

41. The first telephone line they were able to install at their home was both a private and business line for Carolyn Sigg and Vic Haynes; as a result, they placed an answering machine which contained a message. (Tr.261-262; 35-36; 189-91; 147-148) A second telephone line was installed two months later at the beginning of November, 1993. (Tr.334)

42. Henry Sigg objected to contacting the children through the telephone with an answering machine and in January 1994, offered to pay for a second private line. (Tr.35-36)

43. Henry Sigg began leaving messages for Carolyn Sigg and their daughters using foul and abusive language and making a variety of threats against Carolyn Sigg as follows:

a. He threatened to sue her;

b. He threatened to have Vic Haynes charged with child molestation;

c. He threatened to call the mortgage company and tell them that Vic Haynes and Carolyn Sigg had obtained a fraudulent loan; and

d. He threatened that Carolyn Sigg and Vic Haynes would be very sorry. (Tr.262-263)

44. Henry Sigg would call and leave several messages, hang up several times and leave messages for his daughters saying that Carolyn

Sigg was purposely trying to keep them from talking with their father. (Tr. 264)

45. In the early fall, Henry Sigg would call "all hours of the day and night. Six o'clock in the morning, one o'clock at night." (Tr.264) Henry Sigg admits to foul and abusive language on the telephone and would not repeat the language he used on the telephone while testifying in Court. (Tr. 147-148; 189-191)

46. The children have told their mother that Henry Sigg calls her a "bitch", an "asshole", and says that their mother speaks "bullshit". (Tr.287-289)

47. As a result of calls at all hours of the day and night, the abusive language both with the children and with Carolyn Sigg, and to end Henry Sigg's frustration with calling when no one was home, Carolyn Sigg set up a schedule for calling Lindsay and Nicola on Monday and Friday nights and at Henry Sigg's request changed to Monday and Thursday nights at 7:00 p.m. (Tr.265)

48. As a result of the telephone threats and verbal abuse, Vic Haynes filed a Complaint with the Boulder Police Department for telephone harassment and the Boulder Police contacted the Park City Police. (Tr.94)

49. Carolyn Sigg testified that she tried to set up a Thanksgiving visitation through Henry Sigg's attorney, John Mason, since Henry Sigg continued to be verbally aggressive. (Tr.265-266) On the Friday before Thanksgiving, 1993, Henry Sigg was in Moab for his business and wanted to pick up the children the following day. When he could not get Carolyn Sigg on the telephone, he called every fifteen minutes leaving messages on the answering machine. As a result, Vic

Haynes reinstated the Complaint for telephone harassment charges with the Boulder Police. (Tr.95)

50. Henry Sigg and Carolyn Sigg set up Christmas visitation by letter. Henry Sigg was requested to pick up the children in a downtown parking lot on December 20. When Henry Sigg arrived at the parking lot he was arrested by the Boulder Police for the telephone harassment charge and transported to jail where he posted bond. (Tr.53-57) The arrest was made as a result of Vic Haynes supplying the information to the Boulder Police Department. (Tr.270-271)

51. As a result, Henry Sigg obtained a lawyer and defended the telephone harassment charges which cost him One Thousand Dollars ($1,000.00) (D.Ex"2"), (Tr.57) and the matter was scheduled for trial in August 1994.

52. On November 24, 1993, Henry Sigg filed a Verified Petition for Modification of the Divorce Decree (Rec. 475-489) seeking, inter alia, termination of alimony, change in custody based upon interference with visitation, or alternatively, a set schedule of visitation, change in terms of health insurance payment, and attorneys fees.

53. As a result of Henry Sigg's Motion, the Court entered a Temporary Order on February 15, 1994 granting specific visitation and appointing Elizabeth Stewart to perform a custody evaluation. (Rec. 579-584)

54. On June 9, 1994, Carolyne Sigg moved for a Continuance of Trial on the basis that Elizabeth Stewart had not yet filed her custody evaluation. (Rec. 633-634; Addendum, Ex.2)

55. On June 13, 1994, Elizabeth Stewart filed her custody evaluation (Rec: Sealed) which was admitted at trial over objections of Carolyne Sigg's counsel.

56. The trial of this matter was held June 14 and 15, 1994, before the Honorable David S. Young.

57. Carolyne Sigg's counsel moved to continue the trial based upon having received the custody evaluation the day prior to trial and an inability to prepare for the expert witness testimony. (Tr.3-4;78-79). Judge Young denied the motion.

58. At the commencement of the trial, Judge Young made the following comment:

> "I am curious about that last comment. If a parent has interfered with the right of another parent to maintain a relationship with the child, even though that parent may, in his or her own providing of care for the children, have a relatively good environment, isn't it in the childrens' best interest to place the children with the parent who would see that both parents have a healthy relationship with the child? (Tr.17)"

59. At trial, Carolyne Sigg testified that Lindsay was five (5) years old and that Carolyne Sigg had cared for her, and Nicola, age nine (9) years, their entire lives. (Tr.279)

60. Both Lindsay and Nicola are doing very well in school and are socially well adjusted. Carolyn Sigg has a flexible work schedule and is very involved in the regular school activities of both children. (Tr.281-84)

61. Nicola is heavily involved in local sports in Boulder, Colorado, including baseball and gymnastics, and is involved in a cheerleading clinic. (Tr.284-85)

62. Regarding the current condition of the children, Dr. Stewart testified:

> "They're doing very well. They've always done well in school and they have been well taken care of. They are well clothed; well dressed. Mrs. Sigg takes particular attention to matters of being polite and tidy and careful in the home.
>
> The teachers of both children, before the divorce and since the divorce, have reported that Nicola has always been - that the parents, the home, Mrs. Sigg and Mr. Sigg, before, now Mrs. Sigg, has done a good job in following up on homework, the children, or child, Nicola, comes to school on time and there are no problems at all." (Tr.115-16)

She further testified:

> "The children, all the children involved reported to be happy." (Tr.117)

63. Judge Young recognizes that the children are "very very successful in their own individual mental attitudes, school experience and adjustments." (Judge's ruling, June 15, 1994, para. 11; Addendum, Ex.5)

64. Dr. Stewart submitted her custody evaluation (Record: Sealed) and at trial recommended that it would be in the best interests of the children to change custody from Carolyn Sigg to Henry Sigg based upon Carolyn Sigg's alleged interference with visitation rights of Henry Sigg. (Tr.114)

65. Dr. Stewart submitted her custody evaluation (Record: Sealed) and in testimony recommended change of custody of the parties two (2) minor children primarily based upon what she considered interference with visitation rights despite recognition of the children being healthy, happy and doing very well in all respects of their lives while Carolyn Sigg has been the custodial parent for the prior four (4) years and the primary caretaker for their entire lives. (Tr.114)

66. Prominently, Dr. Stewart attempts to create a new legal standard for custodial parents requiring that a custodial parent must

provide more visitation than is required by the Decree of Divorce and bear the entire burden of making visitation work otherwise, custody should be changed.

a. Elizabeth Stewart recognizes that there has never been a period of time during which Henry Sigg has not received the sixty (60) day visitation pursuant to paragraph 2 of the Divorce Decree. (Tr.124-125)

b. Elizabeth Stewart recognizes that her entire recommendation is based upon alleged "interference with custody" for a total of two (2) five (5) month periods out of the forty-eight (48) months when Carolyn Sigg has been the custodial parent. (Tr.125-126)

c. Despite Henry Sigg being foul and abusive and overly aggressive in conversations with Carolyne Sigg, it is Elizabeth Stewart's position that his behavior makes no difference to the communication/visitation issues and that Carolyn Sigg, being the custodial parent, has the burden to be reasonable and make communication/visitation work. (Tr.123)

67. Based upon the evidence presented at trial, Judge Young entered Findings of Fact and Conclusions of Law. (Rec. 671-690; Addendum, Ex.3) The Court entered Findings of Fact with respect to the following issues:

a. Alimony. The Court found that Carolyne Sigg and Vic Haynes began cohabitating in February, 1993, terminated alimony and awarded Henry Sigg a $1,000 credit for overpayment.

b. Day Care Expenses. Carolyne Sigg testified that day care expenses for Lindsay and Nicola Sigg for 1993 and through April 22, 1994 were a total of Four Thousand Two Hundred Seventy Seven Dollars ($4,277.00). In awarding the day care expenses the Court stated "Now I

have no great basis to determine upon which, how much of this should or should not be allowed, and so I am going to make a decision that one-third (1/3) of the amount is the mother's costs solely and the parties are to divide the remainder." (Judge's ruling, June 15, 1994, P.7) (Rec.677)

c. Attorneys Fees. According to Finding of Fact 20, "Defendant has been placed in an extraordinarily difficult position to assert his parental rights of visitations due to Plaintiff's actions, which actions are without excuse or justification" and further "that Plaintiff's conduct. . .was so extreme in nature that it is appropriate and equitable to require Plaintiff to bear some of Defendant's attorneys' fees and costs relative to his Petition to Modify." The Court awarded attorneys fees and related expenses as follows:

(i) Campbell, Maack & Sessions - Nine Thousand Three Hundred Two Dollars and Forty Eight Cents ($9,302.48), which was supplemented by an additional Five Thousand Dollars ($5,000.00) in attorneys fees for a total of Fourteen Thousand Three Hundred Two Dollars and Forty Eight Cents ($14,302.48). (Rec.748);

(ii) Regarding Henry Sigg's costs and expenses with his travel to Boulder, Colorado on December 20, 1993, the amount of Two Hundred Fifty Dollars ($250.00) and a vehicle impoundment charge of Sixty Dollars ($60.00) and attorneys fees charged by Michael Enwall in relation to representation in the criminal proceeding at the behest and instant of Victor Haynes in the amount of One Thousand Dollars ($1,000.00); and

(iii) Expenses of Elizabeth Stewart, Ph.D., for Two Thousand Dollars ($2,000.00) for evaluation plus testimony at trial in the amount of Seven Hundred Dollars ($700.00) plus Three Hundred Thirty

Three Dollars and Thirty Four Cents ($333.34) for review of documents. (Rec.678-79)

The only evidence of financial status of either party in the record is found in the Child Support Worksheet showing Henry Sigg grosses $4,333 per month and Carolyne Sigg grosses $2,800 per month.

d. Custody/Visitation. While there are twenty four (24) separate Findings of Fact on the issue, the Court's position is best illustrated by paragraphs 42 and 47 which respectively state:

> 42. That the children are closely bonded with each of their parents with the exception that tension has been created by Plaintiff because of her limiting or controlling the children's (sic) contact with Defendant and further that the Defendant has made considerable sacrifices to be close to his children and was even willing to sell his business and move to their domicile, if necessary, in order to be with his children.
>
> 47. That although Plaintiff has been an attentive mother who was not neglecting the minor children, and the minor children were generally doing well in her custody, it is in the best interests of the parties' minor children that custody be changed from Plaintiff to Defendant for the principal reason, among others, that Defendant will facilitate visitation between Plaintiff and the minor children whereas Plaintiff has a history of interfering with Defendant's visitation with the minor children." (Rec.683-84)

The only Finding of Fact regarding the issue of stability of the existing custodial relationship is made by incorporation of Dr. Stewart's findings. Paragraph 4 of Dr. Stewart's findings states:

> "The general interest and continuing previously determined custody arrangement where the children are happy and well adjusted. The children are not happy with the angry disputes between the parents and specifically they are not happy with the restrictions on visitation with their father that have been imposed upon them. Lindsay and to a lesser extent Nicola is not happy with Mr. Haynes being in their household during the past fifteen months. His presence and the problems with visiting their father and stepmother have become of

> increasing concern to the children and give them sad feelings. The custody arrangements seemed to work well during the first fifteen months after divorce, but has deteriorated steadily since Mrs. Sigg departed with the children to New Zealand and has failed to facilitate visitation with the children except on her terms which are not in their best interests."

The stability issue was simply slanted by Elizabeth Stewart into an issue relating to visitation and her idea of interference with visitation rights, and there is no indication of the weight accorded the stability factor by the Court.

68. Based upon the Findings of Fact, the Court entered its related Conclusions of Law as follows:

> 1. That the Plaintiff and Victor Haynes entered into a cohabitation arrangement as of the end of February, 1993, and as such, no alimony is due or payable by Defendant to Plaintiff after the end of February, 1993.
>
> 5. That one-third of the day care expenses incurred by the Plaintiff of $1,425.00 are her sole responsibility and that the balance of $2,852.00 shall be assumed and paid by the parties equally.
>
> 6. That Plaintiff shall assume and pay the fees and costs and expenses incurred by the Defendant to Campbell, Maack & Sessions in the amount of $9,302.48 through May 31, 1994, and such additional amounts as the Court may subsequently determine by affidavit submitted by Defendant's counsel.
>
> 7. That Plaintiff shall assume, pay and discharge the costs and expenses of Dr. Elizabeth Stewart in the total sum of $3,033.34 by reimbursing Defendant the amount of $2,683.34. Plaintiff has already paid Dr. Stewart the amount of $350.00.
>
> 8. That Plaintiff shall reimburse Defendant for costs incurred relative to the Boulder visitation on December 20, 1993, in the amount of $310.00, and further that Plaintiff shall pay Defendant's attorney's fees and costs in the defense of the criminal action initiated at the behest and insistence of Victor Haynes in the amount of $1,000.00.

12. That there has been a significant change of circumstances with respect to the custody and visitation as previously ordered by the Court.

13. That there has been a flagrant disregard of the rights of Defendant by Plaintiff and no desire to be flexible, cooperative or supportive.

14. That the custody of the parties' minor children shall be changed from Plaintiff to Defendant as of July 1, 1994 and Plaintiff shall be awarded reasonable visitation rights with the parties' minor children to include at least a minimum the standard statutory visitation schedule."

69. On September 29, 1994, the Court entered the Amended Decree of Divorce. (Rec.693-700; Addendum, Ex.4) (Judge's Ruling, June 15, 1994; Addendum Ex.5)

70. Prior to the June 14-15, 1994 trial, there was one Petition for Modification of the Divorce Decree filed by Henry Sigg which resulted in a Stipulated Withdrawal of Petition. (Rec.471) The Petition filed in New Zealand resulted in a determination that Carolyne Sigg had complied with the Court's visitation Order. Henry Sigg has received all visitation required by the Decree of Divorce from the date of entry of the Decree, April 17, 1991 to the date of trial, June 14-15, 1994, and Carolyne Sigg has never been held in contempt for failure to provide visitation. Despite his superior earning ability and professed concern for his children, Henry Sigg only sporadically paid child support, as of January, 1994, Henry Sigg had failed to pay child support since May, 1993. (Tr.289)

SUMMARY OF ARGUMENT

I.

A. WHERE THE FINDINGS OF FACT REGARDING "CHANGE OF CIRCUMSTANCES" AND "BEST INTEREST OF THE CHILDREN" DO NOT INCLUDE UNREBUTTED EVIDENCE THAT HENRY SIGG RECEIVED ALL VISITATION ORDERED BY THE DIVORCE DECREE, THAT ALLEGED INTERFERENCE WITH VISITATION WAS CONFINED TO TEN (10) OF FORTY-EIGHT (48) MONTHS OF CUSTODY, THAT HENRY

SIGG'S ABUSIVE ACTIONS AND LANGUAGE PREVENTED FACILITATING VISITATION AND CONTAIN NO APPROPRIATE FINDING REGARDING STABILITY OF EXISTING CUSTODY RELATIONSHIP AND WEIGHT GIVEN STABILITY FACTOR BY THE COURT THAT THE FINDINGS ARE FACT ARE CLEARLY ERRONEOUS.

B. THE COURT ABUSED ITS DISCRETION IN CONCLUDING THAT A CHANGE OF CIRCUMSTANCES OCCURRED BASED UPON INTERFERENCE WITH VISITATION WHERE THE CHANGE OF CIRCUMSTANCE IS NOT MATERIAL TO PARENTING SKILLS AND FUNCTIONING OF THE CUSTODIAL RELATIONSHIP AND WHERE INTERFERENCE WITH VISITATION IS THE PRIMARY AND OVERRIDING FACTOR CONSIDERED BY THE COURT. THE OTHER FACTORS CONSIDERED BY THE COURT WERE REASONABLY FORESEEABLE AT THE TIME OF THE DECREE OR INSUBSTANTIAL.

C. WHERE CAROLYNE SIGG HAS SHOWN GOOD PARENTING SKILLS AS A PRIMARY CARETAKER OF HER DAUGHTER NICOLA AND LINDSAY FOR FIVE AND NINE YEARS RESPECTIVELY AND DURING FOUR YEARS OF CUSTODY, BOTH CHILDREN ARE PHYSICALLY AND MENTALLY HEALTHY, AND HAPPY AND WELL-ADJUSTED, THE COURT ABUSED ITS DISCRETION IN FINDING THAT IT WAS IN THE BEST INTERESTS TO TRANSFER CUSTODY TO HENRY SIGG BASED UPON SHORT TERM DISPUTED INTERFERENCE WITH VISITATION.

II.

A. WHERE HENRY SIGG RECEIVED ALL VISITATION ORDERED BY THE DECREE, THERE IS NO STATUTORY BASIS FOR AWARDING HENRY SIGG ATTORNEY'S FEES AND THERE IS NO COMMON LAW BASIS FOR AWARDING HENRY SIGG ATTORNEY'S FEES IN ABSENCE OF SHOWING NEED AND ABILITY TO PAY, IN CONNECTION WITH THE PETITION FOR MODIFICATION.

B. THERE IS NO STATUTORY OR COMMON LAW BASIS FOR AWARDING HENRY SIGG ATTORNEY'S FEES IN CONNECTION WITH HIS DEFENDING TELEPHONE HARASSMENT CHARGES IN THE STATE OF COLORADO.

C. THE COURT ABUSED ITS DISCRETION BY ORDERING CAROLYN SIGG TO PAY ALL OF THE CHILD CUSTODY EVALUATOR'S FEES IN THE ABSENCE OF SHOWING HENRY SIGG'S NEED OR CAROLYNE SIGG'S ABILITY TO PAY.

III.

WHERE THE COURT ADMITTED THAT IT HAS NO BASIS FOR MAKING THE DETERMINE, THE COURT ABUSED ITS DISCRETION REQUIRING CAROLYNE SIGG TO BE RESPONSIBLE FOR ONE-THIRD OF THE DAY CARE COSTS AND REQUIRING THE BALANCE TO BE EQUALLY SPLIT BETWEEN THE PARTIES.

IV.

A. THE FINDINGS OF FACT REGARDING "CO-HABITATION" MISSTATE AND MISCHARACTERIZED THE EVIDENCE AND SHOULD BE SET ASIDE AS NOT REFLECTING THE WEIGHT OF EVIDENCE OR BEING CLEARLY MISTAKEN.

B. WHERE VIC HAYNES MAINTAINED HIS OWN CONDOMINIUM CONTAINING HIS FURNITURE, CLOTHING AND PERSONAL EFFECTS, AND VIC HAYNES DID NOT CONTRIBUTE OR SHARE ANY ONGOING EXPENSES OF UTILITIES, MORTGAGE, OR HOUSEHOLD EXPENSES, AND CAROLYNE SIGG AND VIC HAYNES SHARED NO ASSETS,

THE COURT ABUSED ITS DISCRETION BY TERMINATING ALIMONY EFFECTIVE FEBRUARY, 1993.

V.

JUDGE YOUNG'S FAILURE TO GRANT CAROLYNE SIGG'S MOTION TO CONTINUE THE TRIAL BASED UPON THE CUSTODY EVALUATION HAVING BEEN FILED ONE DAY PRIOR TO TRIAL WAS CLEARLY PREJUDICIAL IN THAT CAROLYNE SIGG HAD NOT ADEQUATE TIME TO PREPARE FOR A MAJOR ITEM OF EVIDENCE CENTRAL TO THE CASE.

LEGAL ARGUMENT

INTRODUCTION

Judge Young's ruling transferring custody of the parties minor children, Nicola, age 9, and Lindsay, age 5, is unsupported by the facts and contrary to case law. Carolyne Sigg has been the primary caretaker of the children since both of their birth's and custodial parent for four (4) years since July, 1990. The basis upon which the change of custody was made is an "interference with visitation" which is also not supported by the trial record. The custody evaluator, Elizabeth Stewart, submitted an extremely biased evaluation, which ignored critical factors. The punitive nature of Judge Young's ruling is underscored by his unwarranted award of attorneys fees against Carolyne Sigg in the amount of Fourteen Thousand Dollars ($14,000.00) plus attorneys fees incurred in a criminal action by Mr. Sigg defending a charge of telephone harassment in Colorado, all of the experts fees in the amount of Three Thousand Dollars ($3,000.00), an arbitrary failure to award day care costs and early termination of alimony on a questionable basis. The imposition of penalties upon Carolyne Sigg and the loss of custody of her daughters is extreme and severe punishment meted out by the Court.

This Brief shall show that the Court's action was a clear abuse of discretion, inconsistent with Utah case law and not supported by the facts.

I.

CHANGE OF CUSTODY BASED UPON "INTERFERENCE WITH VISITATION" IS A CLEAR ABUSE OF DISCRETION.

A. Utah Law On Decree Modification Re: Custody.

Utah has adopted a bifurcated procedure which a trial court is required to follow when considering a Petition for Modification of a custody award. In Hogge v. Hogge, 649 P.2d (Utah 1982) the Utah Supreme Court held:

> "In the initial step, the Court will receive evidence only as to the nature and materiality of any changes in those circumstances upon which the earlier award of custody was based. In this step, the party seeking modification must demonstrate (1) that since the time of the previous decree, there have been changes in circumstances upon which the previous award was based; and (2) that those changes are sufficiently substantial and material to justify reopening the question of custody.
>
> In the second step . . . the trial court must consider the changes in circumstances along with all other evidence relevant to the welfare or best interests of the child including the advantage of stability in custody arrangements that will always weigh against changes in the party awarded custody." Hogge v. Hogge at p. 54.

The Utah Supreme Court has reiterated the necessity and explained the meaning of the threshold requirement of the bifurcated procedure establishing unequivocal guidelines for trial courts to follow in custody modification petitions. In Becker v. Becker, 694 P.2d 608, 610 (Utah 1984), the Utah Supreme Court stated:

> "In order to meet this threshold requirement, a party must show, in addition to the existence and extent of change, that the change is significant *in relation to* the modification sought. The asserted change must, therefore, have some material relationship to and substantial affect on parenting ability or the functioning of the presently existing custodial relationship. In the absence of an indication that the change has or will have such affect, the materiality requirement is not met. Accordingly, it is not sufficient merely to allege a change which, although otherwise substantial, does not essentially effect the custodial relationship.
>
> The required showing materiality is to be distinguished from the evidence that is appropriately presented in the second phase of the proceeding which the "best interest" analysis occurs. The materiality requirement is designed to help the court decide if there is a valid reason to reopen the question already settled by an earlier order, while the best interests analysis relates to a present and future readjustment of the parties' interest. In other words, if the circumstances that have changed do not appear on their face to be the kind of circumstances on which an earlier custody decision was based, there is no valid reason to reconsider that decision. The rational is that custody placements, once made, should be as stable as possible unless the factual basis for them has completely changed."

On facts which are strikingly similar to the case now before the Court, this Court has reversed a trial court modification of a Decree of Divorce transferring custody. In Cummings v. Cummings, 821 P.2d 472 (Utah App. 1991), the parties were divorced in 1980, at which time they had one son. Subsequently, they engaged in periods of reconciliation which resulted in the birth of a second son in 1985. The parties permanently separated in 1986. They stipulated that Mrs. Cummings should have custody of the parties' two minor children. In 1989, Mr. Cummings petitioned for a modification of the Decree of Divorce seeking permanent custody of the children. At trial, Mr. Cummings presented evidence from Dr. Elizabeth Stewart who, after

evaluating the parties and their children, testified that in her opinion, Mr. Cummings should have custody. Dr. Stewart's written evaluation of each person was also admitted into evidence and incorporated into the court's findings. Additionally, the parties 11 year old child testified that he preferred to live with his father but wished to spend as much time as possible with his mother. After a three day trial, the Court found a substantial change in circumstances had occurred and it was in the best interests of the children that custody be transferred to Mr. Cummings. The Court based its determination of a change of circumstances upon the following findings: that Ms. Scott had separate relationships with three different men over the prior three years; that Mr. Scott (Ms. Cummings' remarried spouse) imposed rules and discipline on the children which caused them emotional harm; that Mrs. Cummings interfered with Mr. Cummings' visitation rights; and that custody had never been litigated but had been resolved originally through stipulation. The court also found that Mrs. Cummings held three different jobs during the past three years and had been in her current position for less than one year. Mrs. Cummings appealed the trial court's change of custody.

The Court of Appeals reviewed the facts upon which the trial court based its assessment that a change in circumstances had occurred. The Court first indicated that although Mrs. Cummings had held three different jobs in the last three years, it pointed out the trial court did not state how it adversely affects the children or is relevant to Mrs. Cummings' parenting ability. Then, the Court reviewed Mrs. Cummings' interference with Mr. Cummings' visitation rights stating, "Again, there is no explanation of how these disputes over visitation impact the parenting ability of Ms. Scott (Mrs. Cummings). All

indications are that this was only a recent problem, associated with the current custody dispute." The trial court then reviewed Dr. Stewart's testimony finding that the boys had suffered emotional harms due to the rules and discipline in posed by Mrs. Cummings' current husband. The Court stated, "There is no evidence of physical, mental or psychological abuse. In fact, the record establishes that the only method of disciplining the children that Mr. Scott used was sending the children to their rooms and/or revoking their privileges." The Court concluded that there was no evidence of emotional harm. Finally, the Court noted:

> "The Court (trial court) did not make factual findings regarding the circumstances at either of the two times that the parties stipulated to the custody arrangement. There is undisputed evidence, however, that the circumstances now are much the same as at the time of the second stipulation. There is no evidence or findings to suggest that Ms. Scott (Mrs. Cummings) is substantially less able now to care of the boys and provide them a stable and loving home than she was when Mr. Cummings agreed that Ms. Scott (Mrs. Cummings) should have custody." Cummings v. Cummings at p.477.

In a holding which squarely applies to the facts now before this Court, the Cummings' court stated:

> "In this case, most of the factors contributing to the change in circumstances cited in the Court's findings were foreseeable at both the time of the Decree and the subsequent orders. . . .
>
> We find that even under the Elmer evidentiary standard, the changes are not sufficient to constitute a substantial or material change of circumstances." Cummings at 478.

Concluding the portion of the opinion on custody, the Court made it clear that changes in custody after a long standing custodial relationship are strongly disfavored especially in light of the

petitioner's failure to show a change of circumstance. The Court stated:

> "If this were an initial custody determination, we would be much less likely to disturb the trial court's ruling because of the deference we accord the trial court to weigh the relative merits of the two homes, one with differing but not harmful parenting styles. However, where, as here, the trial court reversed a long standing arrangement, without appropriate consideration of the years these boys had lived with their mother, we cannot affirm. We reverse the custody award, rather than remanding for further proceedings, to minimize further disruption of the children's or parties' lives." Cummings at 479-80.

In the event the Court determines that there has been a substantial and material change in circumstances, it may then consider the "best interests of the child." In Moon v. Moon, 790 P.2d 52, 54 (Utah App.1990) the Utah Court of Appeals enumerated specific factors which must be included in determination of the best interests of a child in a custody dispute. Those factors include:

> "The need for stability in custodial relationships and environment; maintaining an existing primary custodial bond; the relative strength of parental bonds; the relative abilities of the parents to provide care, supervision and a suitable environment for the children and to meet the needs of the children; preference of a child able to evaluate the custody question; the benefits of keeping siblings together, enabling siblings bonds to form; the character and emotional stability of the custodian; and the desire for custody, the apparent commitment of the proposed custodian to parent. Moon v. Moon at 54.

As stated by the Utah Supreme Court,

> "If an existing custody arrangement is not inimical to the child, the continuity and stability of the arrangement are factors to be weighed in determining a child's best interests. What particular way to be accorded those factors in a given case must depend upon the duration of the initial custody arrangement, the age of the child, the nature of the relationship that has developed between the child and the custodial and non-

> custodial parents, and how well the child is thriving physically, mentally and emotionally." Elmer v. Elmer, 776 P.2d 599, 604 (Utah 1989)

The Elmer court further emphasized that "a lengthy custody arrangement in which a child has thrived ought rarely, if at all, to be disturbed, and then only if the circumstances are compelling." Elmer v. Elmer at 604. The Utah Supreme Court has further noted "in considering competing claims to custody between fit parents under the 'best interests of the child' standard, considerable weight should be given to which parent has been the child's primary care giver prior to the divorce." Davis v. Davis, 749 P.2d 647, 648 (Utah 1988).

B. The Findings of Fact regarding Visitation/Custody are not supported by the record and a clear mistake has been made.

The Findings of Fact regarding Visitation/Custody (Tr.27-51; Rec. 679-685) are not supported by the record regarding interference with visitation and, additionally, fail to address critical factors which are required in change of custody cases.

Interference with Visitation findings are contrary to the following unrebutted evidence:

1. Henry Sigg Always Received Visitation Ordered by the Court. Henry Sigg always received the sixty (60) days visitation outlined in paragraph 2 of the Decree of Divorce both while Carolyne Sigg was in New Zealand and in the United States. (Tr.44;183;259) There was no violation of visitation by Carolyne Sigg at any point. Rhetorically, the issue becomes how can the Court legitimately change custody based upon interference with visitation when Henry Sigg has received all of the visitation which has been ordered by the Court.

2. Consistent Verbal Abuse and Harassment. The unrebutted evidence is that Henry Sigg has consistently and relentlessly pursued a

course of verbal abuse of Carolyne Sigg since the Decree of Divorce was entered. The Court and the evaluator make much of the Divorce Decree's requirement to "openly and freely communicate regarding the children." However, Henry Sigg's foul and abusive telephone calls both to the children and to Carolyne Sigg, his several threats and foul name calling in respect to Carolyne Sigg are not addressed as totally preventing any "open and free communication". After listening to telephone messages and conversations with Henry Sigg, the Boulder City Police filed a telephone harassment charge against Henry Sigg and issued a warrant for his arrest. The evaluator, with whom the Court agrees, does not believe that this type of aggressive verbal behavior when attempting to deal with visitation is "not detrimental". (Tr.123)

3. Length of Time of Alleged Interference. The unrebutted evidence shows that the facts presented in support of Carolyne Sigg's alleged interference with visitation span a total of ten (10) months out of a total of forty eight (48) months of being the custodial parent. (Tr.126;257-59) The initial alleged interference occurred during the five (5) month period from when Carolyne Sigg left Utah in late August, 1992 for Colorado and New Zealand and returned to Colorado in February, 1993. The evidence regarding "interference" was vehemently disputed by Carolyne Sigg and the New Zealand Court determined that no violation of the Utah Decree occurred. (Tr.44;183) The second period, after Henry Sigg returned the children five (5) days late on August 28, 1993 through January, 1994. The abbreviated period of alleged interference is clearly contrary to a substantial and material change in circumstances or a change in custody when balanced against the lengthy custodial relationship of Carolyne Sigg with the children of four (4) years and

that of being the primary caretaker of five (5) years for Lindsay and nine (9) years for Nicola.

4. No Required Finding on Stability and Weight Accorded by Trial Court. There is no Finding of Fact which shows an examination of the stability created by the four (4) year custodial relationship between Carolyne Sigg and Nicola and Lindsay and the weight accorded by the Court to the relationship. While Elizabeth Stewart's Finding four, recited above, relates to stability, it provides nothing more than a slanted view of visitation issues.

5. Errors in Findings of Fact in the following respect:

a. Finding of Fact 43 is clearly erroneous in that Carolyne Sigg arranged for visitation for Henry Sigg upon her return from New Zealand as follows: March 19-28; April 15-20; May 28-June 2. (Tr.92;295-97). Additionally, Henry Sigg was accorded his lengthy summertime visitation through August 28, 1993. (Tr.93). During the spring and summer of 1993, Henry Sigg had free and open telephone communication with his daughters. (Tr.255-56)

b. Finding of Fact 47 is clearly erroneous regarding a "history of interference" based upon the unrebutted facts stated above.

6. Bias of Evaluator. While the Court has the discretion to weigh the credibility of the expert witness, it unfortunately buys into the evaluator's unfounded character attack and legal assertion. While the evaluator ignores, and sometimes justifies, outrageous behavior by Henry Sigg, she is quick to magnify insignificant minor issues relating to Carolyne Sigg. For example, as a result of Carolyne Sigg suggesting to Henry Sigg in a flippant manner that Vic Haynes should adopt the children after Henry Sigg suggested that Vic Haynes pay child support, she viewed Carolyne as being totally insensitive and irrational

(Tr.105); that Henry Sigg's name calling and abusive language while dealing with visitation was not detrimental to arranging visitation (Tr.123); that despite the fact Henry Sigg consistently brought the children back late, up to five (5) days, from his visitation, it is "unreasonable to expect him to change" (Tr.144); discounts the fact that Henry Sigg's stepmother adamantly believes that Henry Sigg should not be the custodial parent (Tr.157-58); excuses Henry Sigg's hitting his five (5) year old daughter (Tr.158); places the entire burden of setting up and maintaining visitation on Carolyne Sigg. (Tr.110-112;123-25)

Additionally, Elizabeth Stewart sets up a new legal standard to be followed by custodial parents i.e. that despite having followed the Court's Order in providing an appropriate length of visitation, unless a custodial parent provides more than is required by the Court Order, the custodial parent should lose custody to a more facilitating ex-spouse. (Tr.110-112;123-25)

C. The Findings of Fact fail to demonstrate a "Substantial and Material change of circumstances".

The record and the Findings of Fact fail to show that there has been a substantial and material change of circumstances from the time of entry of the Decree of Divorce to the time of trial, June 14-15, 1994.

In Smith v. Smith, 793 P.2d 407 (Utah App. 1990), the Utah Court of Appeals held that interference with visitation "may be a factor relevant to the issues of both a change in circumstance and the child's best interests". Smith v. Smith at 411. However, that statement was made in light of the facts of the case, i.e. the trial court holding Mrs. Smith in contempt on two occasions for denying visitation rights continuously over an eight (8) year period.

In the case now before the Court, any alleged interference does not rise to the level of the kind of interference which could become "a factor" in a change of custody determination as stated in Smith v. Smith, supra. Carolyne Sigg has allegedly interfered with Henry Sigg's visitation for a period of not more than ten (10) months out of forty eight (48) months, Henry Sigg has received the sixty (60) days visitation each year accorded under the Decree of Divorce and the facts regarding interference have been adamantly disputed by Carolyne Sigg. All of the evidence presented was determined on oral testimony and the Court took Henry Sigg's side. Additionally, the temporary or permanent move to New Zealand by Carolyne Sigg was explicitly addressed in the Divorce Degree and the New Zealand Court found there had been no violation of the Utah Decree by December, 1992.

It is undisputed that Carolyne Sigg has been the primary caretaker of Nicola and Lindsay since each of their births and the custodial parent for the past four (4) years. It is undisputed that the children are healthy, happy, well adjusted, that Carolyne Sigg is a good mother who pays attention to their cleanliness, school activities, physical and mental health and that at the time of the trial both were doing very well in her care. In light of the history with their mother and their current well being, it was virtually remarkable that a finding of "change in circumstance", as it related to Carolyne Sigg's parenting ability or her functioning as a custodial parent, occurred. The Court erroneously allowed the alleged interference to become the controlling factor and not "a factor" in determining whether a change of circumstances had occurred. Reviewing the Court's Findings of Fact, there are no other factors which were not foreseeable by the parties at the time of the divorce or beyond reasonable expectations.

Additionally, the most that can be said about the interference issue in the Findings of Fact is that the arguing on the telephone between Henry and Carolyne Sigg and discussions regarding visitation created "tension" in the home which seem quite reasonable in light of Henry Sigg's foul and abusive telephone calls. (Finding of Fact 42)

As in Cummings v. Cummings, there has been no substantial and material change of circumstances warranting consideration of the "best interests of the children" or, alternatively, warranting a finding of change of custody. The modification of the Decree regarding change in custody should be reversed based on there having been no substantial and material change in circumstances.

D. The Court's determining that it is in the "best interests of the children" to transfer custody is clear error.

The trial court failed to properly evaluate the factors set forth in Moon v. Moon 790 P.2d 52, 54 (Utah App. 1990) when making the change in custody.

The overriding factor of maintaining a custodial relationship which had been in place for four (4) years and a primary caretaking relationship which had been in place five (5) and nine (9) years, and which produced healthy, happy, and stable children was given very short shrift. In that light, it is difficult to see how the bonding to Henry Sigg could be anywhere near as significant as the bonding to Carolyne Sigg, but the Court so found by incorporating Dr. Stewart's finding. Each of the parents had equal ability to provide care and supervision since both were working families and preference for a stated parent should have been given little consideration due to the children's ages. The character and emotional stability were not clearly considered. No mention was made of Henry Sigg's admitted aggressive behavior, corporal

punishment of the children, loss of temper and inability to appropriately express anger. The trial court's finding that it is in the "best interests of the children" to change custody primarily based upon the kind of "interference" alleged is contrary to the fundamental principals and override in concern expressed by this Court of maintaining stability of a custodial relationship, based upon Carolyne Sigg's positive and appropriate parenting for a significant period of time. Cummings v. Cummings, supra; Paryzek v. Paryzek, 776 P.2d 78 (Utah App. 1989); Tucker v. Tucker, 881 P.2d 948 (Utah App. 1994).

II.

THE AWARD OF ATTORNEYS FEES AND EXPERTS FEES IS CONTRARY TO UTAH LAW AND PUNITIVE.

Judge Young awarding Henry Sigg over Fourteen Thousand Dollars ($14,000.00) in attorneys fees in connection with the Petition for Modification, One Thousand Dollars ($1,000.00) in attorneys fees plus associated fees incurred by Henry Sigg in defending the Colorado criminal charge, and over Three Thousand Dollars ($3,000.00) in experts fees relating to the services of Elizabeth Stewart is without statutory or common law basis and is excessive and punitive in nature. The clear message is that Judge Young intends to punish Carolyne Sigg through monetary measures as well as depriving Carolyne of her children. The award of fees by Judge Young is made in light of the only financial information regarding both parties in the record indicating that Henry Sigg's monthly income is Four Thousand Three Hundred Thirty Three Dollars ($4,333.00) and Carolyne Sigg's monthly income is Two Thousand Eight Hundred Dollars ($2,800.00). (Child Support Worksheet, Rec.692; Findings of Fact 53, Rec.686) The Findings of Fact regarding "attorneys fees" do not support the various awards of fees. (Rec.678-679)

A. The award of attorneys fees on the Petition for Modification is without statutory or common law basis. Attorneys fees in the State of Utah may only be awarded according to a specific statutory ground or common law principals. Judge Young abused his discretion in awarding fees to Henry Sigg in that there is no statutory or common law basis under which the award of fees could be made. The only basis upon which the fees could be awarded are:

1. Section 30-3-5(7) U.C.A. Section 30-3-5(7) Utah Code Annotated states:

> "If a Petition for Modification of child custody or visitation provision of a Court Order is made and denied, the Court shall order the Petitioner to pay reasonable fees expended by the prevailing party in that action, if the Court determines that the Petition was without merit and not asserted or defended against in good faith."

Section 30-3-5(7) Utah Code Ann. is inapplicable to the fees awarded by the Court in that Henry Sigg did not assert, nor did the Court find, that "the Petition was without merit and not asserted or defended against in good faith." Additionally, the Petition for Modification was granted.

2. Section 30-3-5(8) Utah Code Ann. Section 30-3-5(8) Utah Code Ann. states:

> "If a Petition alleges substantial noncompliance with a visitation order by a parent, a grandparent or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the Court, the Court may award to the prevailing party costs, including actual attorneys fees and court costs, incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation."

There has been no violation by Carolyne Sigg of the visitation rights granted to Henry Sigg under the Decree of Divorce. Paragraph 2 of the Decree of Divorce states:

> "The Plaintiff is awarded the permanent care, custody and control of the minor children of the parties. There shall be reserved in the Defendant reasonable rights of visitation which will be consistent with those rights of visitation which have been exercised by the Defendant during the pendency of these proceedings, every other weekend, every Tuesday and Thursday evening, and such other times as the parties may agree. In the event the Plaintiff should elect to reside in New Zealand or elsewhere outside of the state of Utah, the Defendant shall be entitled to exercise extended visitation for up to sixty (60) days each year, which visitation shall take into consideration the children's school schedules. If the Defendant does exercise extended visitation because of Plaintiff's move as herein set out, the Defendant is entitled to exercise visitation in two separate segments, at his option."

Henry Sigg has always received the court ordered visitation under paragraph 2 of Decree since entry of the Decree of Divorce on April 7, 1991. When Henry Sigg commenced an action in New Zealand, the Court found that there had been no violation of the Utah Decree. (Tr.44;183) Carolyne Sigg returned to the state of Colorado in February, 1992, and thereafter, Henry Sigg exercised visitation with Lindsay and Nicola consistent with paragraph 2 of the Decree of Divorce. There has simply been no violation of the visitation order.

Additionally, there is no Finding of Fact that Carolyne Sigg has violated paragraph 2 of the Decree of Divorce which would support the Court's award. The Findings of Fact simply state that "Henry Sigg has been placed in an extraordinarily difficult position to assert his parental rights of visitation due to Plaintiff's actions." (Finding of Fact 20); that Henry Sigg has incurred attorneys fees and costs in enforcing the provisions of the Decree (Finding of Fact 21); and that

Plaintiff's conduct is extreme and it is appropriate and equitable to require Plaintiff to bear Defendant's attorneys' fees and costs relative to the Petition for Modification (Finding of Fact 22).

There is no basis for the Court awarding fees under Section 30-3-5(8) Utah Code Ann.

3. Utah common law does not provide a basis for awarding fees. Under Utah common law, in connection with divorce litigation, an award of fees may be made only upon a showing of need and ability to pay. Kerr v. Kerr 610 P.2d 1380 (Utah 1980); Osguthorpe v. Osguthorpe, 804 P.2d 430 (Utah App. 1990).

The record in this matter discloses that Henry Sigg earns significantly more money than Carolyne Sigg i.e. Henry's monthly income is Four Thousand Three Hundred Thirty Three Dollars ($4,333.00) as opposed to Carolyne's, which is Two Thousand Eight Hundred Dollars ($2,800.00) per month. It is apparent that Henry Sigg does not have the need nor does Carolyne Sigg have the ability to pay the awarded fees. Despite the disparity in income, Judge Young awarded Henry Sigg these attorneys fees. It was an abuse of discretion to do so.

B. The award of attorneys fees and related costs in the Colorado action is an abuse of discretion. Judge Young's award of attorneys fees in the amount of One Thousand Dollars ($1,000.00), travel costs of Two Hundred Fifty Dollars ($250.00) and vehicle impoundment costs of Sixty Dollars ($60.00) in connection with Henry Sigg's arrest on charges of telephone harassment in Boulder, Colorado is a further indication of Judge Young's intent to punish Carolyne Sigg. There is no statutory or common law basis for the award.

The record discloses that Vic Haynes, Carolyne Sigg's boyfriend, filed and pursued the telephone harassment charges against

Henry Sigg. (Tr.94-95; 314-315) The Boulder City, Colorado, authorities made an independent assessment finding probable cause to file the charges and pursued the matter after listening to the tape recordings of Henry Sigg's messages and language. Carolyne Sigg is not responsible for, nor does she have control over, the Boulder City municipality in bringing these charges or arresting Henry Sigg on December 20, 1993. The attorneys fees and related costs were simply not incurred by Henry Sigg on any legitimate basis which would allow Judge Young to award the fees. The award of fees is a clear abuse of discretion and should be reversed.

C. Judge Young abused his discretion in awarding experts fees. The Order requiring Carolyne Sigg to pay the child custody evaluator's fee is without statutory or common law basis.

Under Utah law, Judge Young could only award the evaluator's fee based upon need and ability to pay. In Peterson v. Peterson, 818 P.2d 1305 (Utah App. 1991) Mr. Peterson appealed the Court's Order requiring him to pay charges for the custody evaluation, polygraph examination, expert witness fees, service fee and copying charges. The Court initially held that it was within the Court's sound discretion to define costs as those reasonable amounts that are reasonably expended to prosecute or defend a divorce action, and further held, "We also hold that Utah Code Ann. Section 30-3-3 empowers a Court to use its sound discretion in determining whether to award costs based on need and ability to pay." Peterson v. Peterson at 1310. In concluding the opinion, the Court further stated:

> "In light of the fact that the Court knew the financial situation of both parties and made a reason judgment based on that information, we conclude that the Court was within its sound discretion to award these costs to Ms. Peterson

based on her need and on Mr. Peterson's ability to pay." Peterson v. Peterson at 1311.

First, the record now before the Court shows that Henry Sigg has a significantly greater ability to pay Elizabeth Stewart's fees than does Carolyne Sigg. Second, the record is otherwise void of evidence regarding the financial conditions of the parties. As a result, Judge Young clearly abused his discretion in ordering Carolyne Sigg to pay Elizabeth Stewart's fees and costs.

III.

THE AWARD OF DAY CARE COSTS WAS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION.

Judge Young's Order requiring Carolyne Sigg to be solely responsible for one-third (1/3) of the day care costs and the parties thereafter to be responsible for one half (½) of the day care costs is arbitrary and capricious and not based upon any evidence in the record.

The sole evidence in the record regarding costs incurred by Carolyne Sigg for day care of Lindsay and Nicola during 1993 and 1994 is based upon Carolyne Sigg's testimony. (Tr.306-07) Carolyne Sigg testified that her job required that she work at home and that she was not able to effectively pursue her work, especially on the telephone, while her daughters were present. As a result, it was necessary for her to obtain day care, primarily for Lindsay, while she performed her job. None of Carolyne Sigg's testimony was rebutted. In relation to the day care costs, the Court found as follows:

> "The Court finds as to the day care costs that the day care costs were not all incurred as a legitimate cost of day care for the caring for the children while the mother was otherwise working, that many of the decisions in relation to the day care costs were really not necessary even though I recognize that she could not work as fully out of a home with the child present as she might be engaged

> without the child being present. Now I have no great basis to determine on which, how much of this should or should not be allowed, and so I am going to make a decision that one third of the amount is to be the mother's cost solely and the parties are to divide the remainder." (Judge's Ruling, April 15, 1995 at 6-7; Addendum, Ex.5)

There is simply no evidence in the record or rational formula available which would allow Judge Young to require Carolyne Sigg to be solely responsible for one third (1/3) of the day care costs while awarding the balance to be paid equally. The Court abused its discretion in entering the award. The total costs for day care of Four Thousand Two Hundred Seventy Seven Dollars ($4,277.00) for the years 1993 and 1994 should be equally split between the parties.

IV.

EARLY TERMINATION OF ALIMONY BASED UPON COHABITATION IS AN ABUSE OF DISCRETION.

Judge Young's ruling that payment of alimony by Henry Sigg to Carolyne Sigg should terminate as of February, 1993, is not supported by the record and is contrary to Utah law.

A. The Findings of Fact on Cohabitation are contrary to the weight of evidence.

Mr. Sigg has misrepresented and mischaracterized Carolyne Sigg's testimony on the issue of cohabitation, which is contained at pages 223-224 and 326 of the transcript of hearing. Henry Sigg repeated his daughter Nicola's statement regarding furniture at pages 212 - 216 of the transcript. As a result of the confined nature of Carolyne Sigg's testimony on the issue, "marshalling the evidence" is the same as accurately stating the evidence from the record and correcting Mr. Sigg's very apparent misstatements contained in Findings of Fact 5, 6,

7, 9, 10 and 12 at pages 4 and 5 of the Findings. Carolyne Sigg's testimony is:

Carolyne Sigg left Park City on August 20, 1992 and drove to Boulder, Colorado, where she stayed with Vic Haynes and the children for five (5) to six (6) days at his home at 3734 Cripple Creek Trail, prior to going to Disneyland and Auckland, New Zealand. (Tr.223-24) During this time she slept with him and had intercourse. (Tr.226) Prior to leaving Park City, Carolyne sold her furniture and placed small household items in storage, none of which were moved to Haynes house. (Tr.227) When Ms. Sigg returned from New Zealand in February 1992, she stayed with Vic Haynes at his home for two (2) weeks, where she and the girls ate, slept, and maintained their wearing apparel brought from Australia; only food expenses were shared; and Carolyne and Vic Haynes had intercourse. (Tr.229) At the end of two weeks, Carolyne and the children moved to a condominium two blocks away at the address of 3003 Redstone Lane (Tr.229) which she leased for six months through the end of August 1993. (Tr.230) In August, she and Haynes purchased a home together. (Tr.230) Carolyne Sigg purchased all the furniture for her condominium; Haynes lent her a couch to use. (Tr.231) Haynes often shared meals with her. (Tr.231) Ms. Sigg and Mr. Haynes often saw each other; Mr. Haynes slept at her condominium from time to time and on those occasions they had intercourse. (Tr.232) Mr. Haynes never assisted Carolyne Sigg in expenses; however, occasionally he contributed expenses for food or brought in food. (Tr.232) Mr. Haynes from time to time parked his car at Carolyne Sigg's and had free access to the house and access to a key to the house, which was kept outside. (Tr.233) Mr. Haynes never maintained clothes at Carolyne's residence but he kept his clothes at his own residence two blocks away. (Tr.233-34) Mr. Haynes

did not conduct business out of her condominium. (Tr.234) Vic Haynes visited Carolyne Sigg and the girls in New Zealand during Christmas. (Tr.326) According to Henry Sigg, his daughter Nicola said "Nicky just had told me that because we were wondering if Carolyne and Vic are together, Nicky had told me that the TV and all the good stuff was in one apartment and that Vic basically, essentially slept with the childrens' mother every night." (Tr.213)

When viewed in a light most favorable to Mr. Sigg, key portions of Findings of Fact 5, 6, 7, 9, 10 and 12 are significantly inaccurate and contrary to the clear weight of evidence and should be set aside or replaced with the accurate immediately preceding Statement of Fact.

B. Under Utah law, Carolyne Sigg did not "cohabitate".

Either under the accurate Statement of Fact set forth above, or under the mischaracterized Statement of Facts regarding cohabitation, Carolyne Sigg and Vic Haynes did not "cohabitate" or "reside" together as the latter term is defined for purposes of terminating alimony. Section 30-3-5(6) Utah Code Ann.

The Findings of Fact do not meet the threshold requirement established by the Utah Supreme Court that parties must maintain "common residency" in order to terminate alimony. In Haddow v. Haddow, 707 P.2d 669 (Utah 1985), the Court stated that there are two (2) key elements to determining cohabitation: common residency and sexual contact evidencing a conjugal association; "common residency" means "the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time." Haddow v. Haddow at 672. Reviewing the facts regarding common residency, the Court found that a Mr. Hudson spent a substantial amount of time at the appellant's

(Mrs. Haddow's) home but questioned the court's not finding that Mr. Hudson was at the appellant's home when she was not there or had a key. This was particularly significant in that they stated "a resident will come and go as he pleases in his own home, while a visitor, however regular and frequent, will schedule his visits to coincide with the presence of the person he is visiting." Haddow v. Haddow at 673. There was testimony that Mr. Hudson did not move any furniture into the home or keep any personal items there except, toiletry articles, and a few items of clothing that appellant had laundered or dry cleaned and one picture album. However the Court noted there was no significance to these personal effects. The Court also considered significant the issue of shared living expenses. They found it significant that the parties did not share any financial obligations surrounding the maintenance of the household or share any assets. In particular, Mr. Hudson did not contribute to mortgage payments, insurance or utility bills, but occasionally paid appellant for purchasing food. The Court held:

> "It is therefore our opinion that common residency elements of cohabitation has not been established." Haddow v. Haddow at p. 674.

The Court quoted with approval In re the marriage of Gibson, 320 N.W.2d 822, 824 (1982) as follows:

> "The time Petitioner's boyfriend spent in the dwelling was extensive, easily sufficient to qualify as residence if time alone controlled. But the time was not spent as a resident. He maintained a separate residence and shared none of the expenses of this one. He did not even have a key or freedom to enter it except when Petitioner was present. In simple terms he did not live there."

Additionally, under Utah law, Carolyne Sigg's staying with Vic Haynes five to six (5-6) days prior to going to New Zealand in August 1992, and when returning from New Zealand, for two (2) weeks in February

1993, does not qualify as "cohabitation" or residing with Mr. Haynes under Utah law. Knuteson v. Knuteson, 619 P.2d 1387, 1389 (1980).

The Court failed to follow settled Utah law by determining that Carolyne Sigg and Vic Haynes began cohabiting in February 1993 while Carolyne Sigg and Vic Haynes resided at two (2) separate addresses. Alimony should not have been terminated until the end of August 1993, when Vic Haynes and Carolyne Sigg purchased a home together and moved in. Alimony should be reinstated through the end of August, 1993, at the rate of $500 per month under the Divorce Decree.

V.

FAILURE TO CONTINUE THE TRIAL BASED UPON APPROPRIATE MOTION WHICH IS PREJUDICIAL ERROR

Judge Young's failure to grant Carolyne Sigg's written Motion to continue the trial filed prior to trial based upon failure to receive and be able to adequately prepare for Elizabeth Stewart's custody evaluation, which was again orally made at trial, was prejudicial error. The central issue of the Petition for Modification was child custody. It is clear from the record that much of Judge Young's decision was based upon the custody evaluation. Where it is clear that a party does not have access to expert testimony which is critical to the central issues of the litigation, it is prejudicial error not to continue the trial until a party has adequate time to prepare for the evidence. Yates v. Superior Court, 586 P.2d 887 (Ariz. App. 1978).

CONCLUSION

Judge Young has emotionally and financially punished Carolyne Sigg by transferring custody of her two minor daughters to Henry Sigg and ordering her to pay excessive amounts of fees solely on the basis of the oral testimony of Henry Sigg (all of which was disputed) that

Carolyne Sigg interfered with visitation for a period of ten (10) months out of forty-eight (48) months of Carolyne Sigg's custody. It is undisputed that prior to leaving the State of Utah in August, 1991, Henry Sigg exercised Court Ordered visitation. After Carolyne Sigg moved from the State of Utah, Henry Sigg always received sixty (60) days per year visitation as stated in paragraph 2 of the Decree. Temporary or permanent move outside of the State, or to New Zealand, was specifically addressed in the Divorce Decree. The New Zealand Court found no violation of the Utah Divorce Decree. Henry Sigg received visitation on three separate occasions in the spring of 1993 and exercised full visitation through August, 1993. Henry Sigg's foul and abusive telephone messages and language and overly aggressive behavior when dealing with Carolyne Sigg on visitation made it impossible for "open and free communication", which Henry Sigg now tries to turn to his own advantage by alleging interference with visitation. There is simply no substantial and material change of circumstances between the date of the Divorce Decree and the date of the trial.

It is undisputed that Carolyne Sigg is a good mother, who has been the primary care taker of the children, Nicola and Lindsay Sigg, since birth, and that as a result of her care taking, the children are healthy, happy, and doing well in school, and are well adjusted. Not surprisingly, the Court found that discussions with Henry Sigg created "tension in the home" which was used as a basis to change custody. This "tension" was given significantly greater credence in changing custody than the recognized value of stability of a healthy parenting relationship fostering well adjusted children. Elizabeth Stewart's testimony regarding Carolyne Sigg crystallizes her bias and gives little or no weight to the overriding concerns of this Court regarding

stability and maintaining a healthy custodial relationship and regarding Henry Sigg, literally turns a blind eye to his failure to timely pay alimony and child support, his threats, outrageous language and conduct. The "best interests of the children" were simply ignored by the Court and the evaluator in favor of protecting Henry Sigg's telephone contact with his daughters.

The fees awarded were punitive in nature where there was no violation of the visitation order of the Court and no showing of Henry Sigg's need or Carolyne Sigg's ability to pay fees. Termination of alimony as of February, 1993, was contrary to the evidence where Carolyne Sigg and Vic Haynes maintained two totally separate households, did not share household expenses, mortgage payments, assets, and maintained furniture, clothing and personal property in separate residences.

The cumulative effect of the Trial Court's action emasculates and pulverizes the traditional legal notions of fostering stability in the lives of children of divorced parents, rewarding positive parenting, and discouraging foul, inappropriate, and criminal behavior. The Court simply ignored precedential direction for and confines on its authority.

The Amended Decree of Divorce should be reversed in its entirety.

DATED this 10th day of January, 1995.

LITTLEFIELD & PETERSON

By: E. Paul Wood, Esq.
Attorney for Plaintiff/Appellant
Carolyne Sigg

E. PAUL WOOD - 3537
Attorneys for Appellant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN AND FOR THE STATE OF UTAH COURT OF APPEALS

----------oo0oo----------

CAROLYNE JOAN SIGG,	:	
	:	**CERTIFICATE OF SERVICE**
Plaintiff/Appellant,	:	
	:	
v.	:	
	:	
HENRY ALFRED SIGG,	:	
	:	
Defendant/Respondent.	:	Case No. 940650-CA
	:	

----------oo0oo----------

I hereby certify that I caused to be hand-delivered to the following attorneys of record a copy of the revised Appellant's Brief on the day and year set forth below:

Clark Sessions, Esq.
Dean C. Andreason, Esq.
CAMPBELL, MAACK & SESSIONS
201 South Main, #1300
Salt Lake City, Utah 84111

DATED this 18th day of May, 1995.

LITTLEFIELD & PETERSON

E. Paul Wood
Attorney for Appellant

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ADDENDUM

Exhibit "1" Divorce Decree, April 17, 1991

F-101

Craig M. Peterson (2579)
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

----------oo0oo----------

CAROLYN BOWDEN SIGG,	:	DECREE OF DIVORCE
Plaintiff,	:	
v.	:	
HENRY ALFRED SIGG,	:	
Defendant.	:	Case No. 10482

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The above matter came before the Court on April 3rd and April 4, 1991, the Honorable Frank G. Noel, judge presiding for trial. The Plaintiff was present in person and represented by counsel, Craig M. Peterson. The Defendant was present in person and represented by counsel, John B. Mason. The Court having heretofore entered its Findings of Fact and Conclusions of Law, does now enter its Decree of Divorce as follows:

DECREE OF DIVORCE

1. Each of the parties are awarded a Decree of Divorce against the other upon the grounds of irreconcilable differences.

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2. The Plaintiff is awarded the permanent care, custody and control of the minor children of the parties. There shall be reserved in the Defendant reasonable rights of visitation which will be consistent with those rights of visitation which have been exercised by the Defendant during the pendency of these proceedings, every other weekend, every Tuesday and Thursday evening, and such other times as the parties may agree. In the event the Plaintiff should elect to reside in New Zealand or elsewhere outside of the state of Utah, the Defendant shall be entitled to exercise extended visitation for up to sixty (60) days each year, which visitation shall take into consideration the children's school schedules. If the Defendant does exercise extended visitation because of Plaintiff's move as herein set out, the Defendant is entitled to exercise visitation in two separate segments, at his option.

3. In the event the Plaintiff does not move outside the state of Utah, the Defendant shall be entitled to four weeks of visitation during the summer for the purpose of exercising vacation. In the event the Defendant does not exercise vacation during the summer, the Plaintiff shall have rights of visitation with the children which are reciprocal to those herein reserved in the Defendant. If the Defendant does elect to take vacation with the children during extended visitation, he shall not take the

children outside of the United States without the Plaintiff's consent. The Plaintiff shall not unreasonably withhold her consent, and if she does, the matter may be submitted to the Court for determination.

4. The parties shall freely and openly communicate regarding actions to be taken in the best interests of the children. There shall be reserved in the Defendant the right to receive and review the schooling and academic records of the children, all medical and dental records, and all social and religious records of importance. In those instances where duplicate records are not provided by the children's school or medical provider, the Plaintiff will forward copies of those records to the Defendant, such as the children's report cards and parent-teacher notices. The Defendant shall have the right of access to school and medical records and to participate in parent-teacher conferences and other regularly scheduled school activities of the children. The parties shall take no action to interfere in the enhancement of the other's relationship with the children, nor any action which may be construed in any respect as derogatory toward the other parent in that relationship. In the accommodation and exercise of visitation, the parties will take into the consideration of the children's needs to be in attendance at

activities and shall give close attention to those activities and facilitate the children's participation therein.

5. The Defendant shall pay to the Plaintiff $344 per month per child as child support for a total of $688 per month. Child support will be paid in one lump sum on or before the 5th day of each month through the Clerk of the Court. Child support shall be paid by the Defendant until such time as the minor children reach the age of eighteen (18) or graduate from high school with their normal graduating class, whichever shall occur later.

6. The Defendant shall provide health and accident insurance for the benefit of the minor children of the parties. Any medical or dental expenses which are incurred for the children not paid for by the policy of insurance, shall be shared equally by the parties.

7. The Defendant shall maintain a policy of term insurance upon his life in the amount of $100,000, naming the minor children as beneficiaries thereunder. Such policy shall be maintained until the Defendant is no longer required to pay child support pursuant to the provisions of this Decree or further orders of this Court.

8. The Defendant shall pay to the Plaintiff the sum of $500 per month as and for alimony, which alimony shall terminate as provided by law or upon further Order of this Court. Alimony shall

be paid in one lump sum on or before the 5th day of each month through the Clerk of the Court.

9. The Plaintiff shall be awarded all right, title and interest in real and personal property as follows:

a. The home and real property located at 2724 Creek Drive, Park City, Utah, and the Defendant shall execute a Quit Claim Deed in favor of the Plaintiff for said property forthwith.

b. All furniture, furnishings and personal property currently in possession of the Plaintiff.

c. The 1987 Mercedes Benz 260E automobile.

d. All cash accounts or savings accounts currently in her name.

e. All right to any proceeds from the Monarch Life Insurance policy held in her name.

f. All right to her Merrill Lynch independent retirement account.

g. The right to take custodial control of the savings account of the parties' minor child, Niki Sigg.

10. The Defendant shall be awarded all right, title and interest in and to real and personal property as follows:

a. All interest in the Sigg Family Partnership and the Plaintiff shall Quit Claim any interest she may have therein in favor of the Defendant, which interest is as follows:

1. The real property and residence located at 839 Woodside Avenue, Park City, Utah;
2. The real property and residence located at 835 Woodside Avenue, Park City, Utah;
3. The real property known as Lot #265, Highland Estates.

b. All furniture, furnishings and personal property currently in Defendant's possession.

c. All cash and savings accounts currently held in Defendant's name.

d. All right and interest the parties may have in Cougar Energy.

e. The Monarch Life Insurance policy currently in Defendant's name.

f. The Defendant's Merrill Lynch independent retirement account held in his name.

g. Twelve (12) water shares in High Valley Water Company.

h. Any and all interest the parties may have in the business known as MountainTops, Inc.

11. There are certain checks belonging to the parties which are currently in possession of Defendant's attorney. The value of these checks will be divided equally between the parties and counsel for the Defendant shall execute checks to each of the parties forthwith.

12. The outstanding liabilities incurred by the parties during the marriage shall be paid by each of them as follows:

a. The Plaintiff shall assume and pay outstanding liabilities as follows:

1. The outstanding first mortgage owed on the parties' marital residence at 2724 Creek Drive.
2. The outstanding liability owed to Chase Bank for the Mercedes automobile.
3. Any and all liabilities which she has incurred in her own name since the parties' separation from and after June, 1990.

b. The Defendant shall assume and pay outstanding liabilities as follows:

1. All Sigg Family Partnership liabilities.
2. The outstanding mortgage payment owed to Lucy Stricker for the real property

located at 839 Woodside Avenue, Park City, Utah.

3. The outstanding mortgage payment owed to Chase Bank for the real property located at 839 Woodside Avenue, Park City, Utah.
4. The outstanding mortgage owed to Colonial Savings on the real property located at 835 Woodside Avenue, Park City, Utah.
5. Any outstanding liability which Defendant owes for 1989 income taxes.
6. The outstanding liability owed to Monarch Life Insurance Company for loans taken by the Defendant on his life insurance policy.
7. The outstanding liability owed to High Valley Water Company for the water shares being awarded to the Defendant.
8. Any and all liability associated with or arising from the parties' business known as MountainTops, Inc., including the "Line of Credit."
9. Any and all liabilities the Defendant has incurred from and after the date of the

parties' separation of June, 1990.

13. Each party shall file and pay their 1990 state and federal income taxes individually. The Defendant shall provide to the Plaintiff a copy of the 1990 income tax returns he files, and he shall provide Plaintiff with a copy of his income tax return which he files for each year thereafter. Said copies are to be provided to the Plaintiff at the same time as the Defendant files the returns.

14. The Defendant shall take all action necessary to immediately remove the mortgage from the marital residence which secures the "Line of Credit" used to finance the parties business, MountainTops, Inc., and he shall secure the "Line of Credit" with the real property owned by MountainTops, Inc. Further, the Defendant shall use his best efforts to cause the mortgage on the real property known as Lot #265, Highland Estates, to be removed from that property as soon as possible and to transfer that liability so that the real property owned by MountainTops, Inc., will act as security in place and in lieu of Lot #265, Highland Estates, for the "Line of Credit."

15. The Defendant shall pay to the Plaintiff the sum of $60,000 as equalization of the property distribution between the parties. The Defendant shall pay to the Plaintiff $25,000 cash on or before June 2, 1991. The Defendant shall also pay to the

Plaintiff the sum of $40,000, without interest, on or before April 1, 1992. The Defendant shall execute a Promissory Note in the amount of $40,000 and shall give Plaintiff a Deed of Trust to secure that note on the property owned by MountainTops, Inc. The Deed of Trust given to the Plaintiff shall be second only to the secured position given to the financial institution when the real property owned by MountainTops, Inc. is used to secure the "Line of Credit," which the Defendant is required to transfer from the marital residence and Lot #265, Highland Estates, as hereinbefore provided. Further, as additional security for the note, the Defendant shall give Plaintiff a Trust Deed for Lot #265, Highland Estates. This Promissory Note and Trust Deed shall become first position on the Highland Estates property when the real property owned by MountainTops, Inc., becomes the security for the "Line of Credit" used by the business. The real property owned by MountainTops, Inc. shall not be used to secure a "Line of Credit" which exceeds the current "Line of Credit" available that is now secured by the marital residence and Lot #265, Highland Estates, until such time as Defendant has satisfied this obligation owed to the Plaintiff.

16. The Defendant shall be required to make certain that all payments, registration or taxes due on the property being awarded to the Plaintiff are current as of April 3, 1991.

17. The Plaintiff is awarded judgment against the Defendant in the amount of $17,500 as and for attorney's fees and costs which the Plaintiff has incurred in this matter.

DATED this 10 day of April, 1991.

BY THE COURT:

District Court Judge

THIRD JUDICIAL DISTRICT COURT SUMMIT ★ COUNTY OF UTAH

Approved as to form:

John B. Mason, Esq.
Attorney for Defendant

Sigg.DEC/P4

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BOOK K PAGE 640

ADDENDUM

Exhibit "2" Motion to Continue Trial, June 14, 1994

NO. _____

FILED

JUN 14 1994

Clerk of Summit County

By _____ Deputy Clerk

ELLEN MAYCOCK - 2131
KRUSE, LANDA & MAYCOCK, L.L.C.
Attorneys for Plaintiff
Eighth Floor, Bank One Tower
50 West Broadway
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IN THE THIRD JUDICIAL DISTRICT COURT

FOR SUMMIT COUNTY, STATE OF UTAH

CAROLYN BOWDEN SIGG,	)	
Plaintiff,	)	**MOTION FOR CONTINUANCE OF TRIAL**
vs.	)	
HENRY ALFRED SIGG,	)	Civil No. 89 43 10482 Judge David S. Young
Defendant.	)	

Plaintiff hereby moves the court for continuance of the trial of the petition to modify the decree of divorce in the above-entitled matter presently scheduled for June 14, 1994, at 9:00 a.m. The grounds for this motion are as follows:

1. The custody evaluation has not yet been completed. The parties are informed by Dr. Elizabeth Stewart, the custody evaluator, that the evaluation will be completed some time Friday, June 10, 1994. This is inadequate time to prepare the case for trial.

2. Discovery has not yet been completed. As of the time of this motion, defendant has not yet indicated what his income is. It is impossible properly to calculate child support without such income information.

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3. Defendant has not answered plaintiff's interrogatories or formally responded to plaintiff's request for production of documents, although seven boxes of documents have been made available for inspection and copying within the last few days. Based on the documentation made available to date, it is not possible to determine defendant's income. In addition, it is impossible to review the documents within the time allowed.

For the foregoing reasons, plaintiff's motion for continuance of the trial should be granted.

DATED this 9th day of January, 1994.

KRUSE, LANDA & MAYCOCK, L.L.C.
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101

By _____
ELLEN MAYCOCK
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I transmitted a true and correct copy of the foregoing **MOTION FOR CONTINUANCE OF TRIAL** to the following, *via facsimile transmission,* this 9th day of January, 1994:

Dean C. Andreasen, Esq.
Campbell, Maack & Sessions
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111

_____

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ADDENDUM

Exhibit "3" Findings of Fact and Conclusions of Law, September 29, 1994

Clark W. Sessions (2914)
Dean C. Andreasen (3981)
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One Utah Center, Thirteenth Floor
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Telephone (801) 537-5555

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

CAROLYNE JOAN SIGG, Plaintiff, vs. HENRY ALFRED SIGG, Defendant.	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 10482 Judge David S. Young

Plaintiff's Order to Show Cause and Defendant's Verified Petition for Modification of Decree of Divorce and related matters came on regularly for trial before the Honorable David S. Young one of the Judges of the Court on June 14 and 15, 1994. Plaintiff was present and represented by Ellen Maycock, Esq. of Kruse, Landa & Maycock, her attorneys. Defendant was present and represented by Clark W. Sessions, Esq. and Dean C. Andreasen, Esq. of Campbell Maack & Sessions, his attorneys. The Court heard and considered the sworn testimony of the parties and various witnesses, received and reviewed exhibits and documentary evidence offered by the parties, heard and considered the arguments of counsel, and

reviewed the files and records herein. On September 23, 1994, the Court heard argument from counsel for the parties on Plaintiff's Objections to Defendant's Proposed Findings of Fact, Conclusions of Law, and Decree of Divorce. The Court being fully advised in the premises now makes and enters the following:

FINDINGS OF FACT

Decree of Divorce/Order and Judgment

1. That the marriage of the parties was terminated by a Decree of Divorce entered on April 17, 1991.

2. That the Decree of Divorce, in relevant part, provided as follows:

a. Plaintiff was awarded the sole custody of Nicola Sigg and Lindsay Sigg, the minor children of the parties. Defendant was awarded reasonable rights of visitation. At the time the Decree of Divorce was entered, the parties anticipated that Plaintiff might "elect to reside in New Zealand or elsewhere outside of the State of Utah." In such event, the Decree of Divorce provided that Defendant would be entitled to exercise extended visitation for up to sixty days each year.

b. The parties were ordered to "freely and openly communicate regarding actions to be taken in the best interests of the children." Defendant was awarded the right to receive and review all school, medical, dental, social and religious records of importance. Defendant was awarded the right to participate in the children's school activities including parent-teacher conferences

and programs. The parties were ordered to "take no action to interfere in the enhancement of the other's relationship with the children, nor any action which may be construed in any respect as derogatory toward the other parent in that relationship.

c. Plaintiff was awarded from Defendant child support in the amount of $688.00 per month.

d. Defendant was ordered to provide health insurance for the benefit of the minor children. The parties were ordered to equally pay for all uninsured medical costs incurred for the benefit of the minor children.

e. Plaintiff was awarded from Defendant alimony in the amount of $500.00 per month to "terminate as provided by law or upon further Order of this Court."

f. Plaintiff was awarded, among other items, the marital home located in Park City subject to the mortgage thereon, $65,000.00 as equalization of the property distribution between the parties and $17,500.00 as attorney's fees.

g. Defendant was awarded, among other items, certain real property subject to the mortgages thereon, and certain partnership and business interests.

3. That on September 24, 1991, the Court entered an Order and Judgment. The Order and Judgment provided, in relevant part as follows:

a. Defendant was ordered to obtain a health insurance policy for the benefit of the minor children with "a deductible of

not more than $200.00. However, in the event there is a substantial difference in cost by obtaining a health and accident insurance policy with a deductible amount of $500.00, then the Defendant shall be allowed to maintain such an insurance policy."

b. "The parties shall begin to cooperate to facilitate visitation. Further, in the event the Defendant is going to be late in picking up the children or returning them, he shall be required to call the Plaintiff and advise her accordingly."

Termination Of Alimony Due To Cohabitation

4. That Defendant paid to Plaintiff alimony through April 1993, in the amount of $500.00 per month but has paid no alimony since that time based on his claim that Plaintiff was and is cohabiting with one Victor Haynes.

5. That in the summer of 1992, following the sale of the marital residence awarded to her in the divorce, Plaintiff and the parties' minor children traveled to Boulder, Colorado where she and the parties' minor children lived with Mr. Haynes for approximately five days until she and the minor children traveled to Disneyland and to New Zealand.

6. That prior to traveling to New Zealand, while residing in Boulder, Colorado, Plaintiff had no place of residence other than with Mr. Haynes; that her personal effects were located there and that Plaintiff and Mr. Haynes effectively resided together and maintained an on-going relationship including sexual intercourse admitted to by the Plaintiff.

7. That Mr. Haynes traveled to New Zealand during the 1992 Christmas holiday and resided with Plaintiff for approximately a two week period.

8. In or about February 1993, Plaintiff and the minor children returned to Boulder, Colorado from New Zealand. Plaintiff's primary reason for returning to Boulder, Colorado was to continue her relationship with Mr. Haynes.

9. That following her return from New Zealand to Boulder, Colorado in February 1993, the parties in effect resided together even though for some period of time they had separate condominiums in the same condominium complex.

10. That while residing in Boulder, Colorado, following her return from New Zealand, Plaintiff and Mr. Haynes maintained a continuing relationship including sexual intercourse; shared living expenses; shared open access to each other's condominium units either by reason of a key which Mr. Haynes was given by Plaintiff or access to a hidden key, the location of which was disclosed by the Plaintiff to Mr. Haynes; ate meals together and shared expenses for food and incidentals; maintained their clothing in the same condominium; used the same furniture; Mr. Haynes parked his automobile on occasion at Plaintiff's residence; and Plaintiff and Mr. Haynes otherwise lived as though they were husband and wife.

11. That in or about August 1993, Plaintiff and Mr. Haynes acquired a residence and real property together in Boulder, Colorado and do not dispute that they cohabited each with the other

and have done so since the acquisition of such residence and real property.

12. That based on the foregoing findings of fact, Plaintiff and Mr. Haynes began to cohabit no later than February 1993 and, accordingly, Defendant's obligation for alimony should terminate as of February 1993.

13. That based on the foregoing findings of fact, Defendant has over paid Plaintiff $1,000.00 for alimony and should receive credit in that amount against his child support obligation.

Health Insurance

14. That the Decree of Divorce requires Defendant to provide health and accident insurance for the benefit of the minor children of the parties and further that the parties have agreed that Defendant maintain such insurance with a deductible between the amounts of $200.00 and $500.00.

15. That in order to reduce the premiums for such insurance, it is reasonable that the Defendant provide insurance with a deductible of $1,000.00 provided that he pay the first $750.00 of medical expenses for the care and treatment of the parties' minor children and that thereafter the parties share medical expenses equally.

16. That it is reasonable that if Plaintiff is able to obtain health and medical insurance through her employment at a better or reduced rate at no cost to her, she should acquire such insurance and save Defendant that cost.

Child Care

17. That Plaintiff has, until very recently been employed by Mr. Haynes and worked out of the home she acquired with Mr. Haynes in Boulder, Colorado.

18. That while Plaintiff could not work as fully and without interruption out of a home with children present as she could without the children being present, the majority of the child care costs incurred were not necessary. Plaintiff withdrew her claim for day care costs attributable to Ms. Margaret Braae in open Court. While the evidence was not clear as to the allocation of expenses between the parties' two minor children, it is equitable that of the total amount claimed due and owing to Children's World Learning Center principally for the day care of Lindsay Sigg in the amount of $2,816.00 for the year 1993 and $1,461 for the year 1994 through April 22 or a total of $4,277, one-third thereof or $1,425 should be the sole responsibility of the Plaintiff and the balance should be assumed and paid by the parties equally.

19. That it is equitable that the parties equally share any necessary employment-related child care costs incurred in the future.

Attorney's Fees

20. That as more fully hereinafter set forth, Defendant has been placed in an extraordinarily difficult position to assert his parental rights of visitation due to Plaintiff's actions, which actions are without excuse or justification.

21. That Defendant has been required to incur attorney's fees and costs in enforcing the provisions of the Decree of Divorce and the Order and Judgment.

22. That Plaintiff's conduct as hereinafter more fully set forth was so extreme in nature that it is appropriate and equitable to require Plaintiff to bear some of Defendant's attorneys' fees and costs relative to his Petition to Modify.

23. That it is equitable that Plaintiff assume and pay Defendant's costs and expenses incurred in connection with these proceedings in the amount of $9,302.48 to Campbell Maack & Sessions through May 31, 1994, and further that Defendant's counsel is authorized to submit to the Court an affidavit of fees and costs incurred from May 31, 1994, through the conclusion of this matter for further consideration by the Court.

24. That it is equitable that Plaintiff pay Defendant's costs and expenses connected with his travel to Boulder, Colorado on December 20, 1993, in the amount of $250.00, the impoundment of his vehicle in the amount of $60.00 and the attorneys' fees charged by Michael Enwall, Esq. in his representation of Defendant in a pending criminal proceeding initiated at the behest and insistence of Victor Haynes with the knowledge of Plaintiff. Said attorney's fees are in the amount of $1,000.00.

25. That the charges and expenses of Elizabeth Stewart, Ph.D. of $2,000 for the evaluation plus her testimony at trial in the sum of $700.00 plus the additional amount of $333.34 owing for the

review of documents shall be paid by Plaintiff. Accordingly, Plaintiff shall reimburse Defendant the amount of $2,683.34 for the amounts Defendant has paid Dr. Stewart. Plaintiff has already paid Dr. Stewart $350.00.

26. That it is equitable that the parties otherwise pay their own attorney's fees and costs incurred in this case.

Custody/Visitation

27. That the Decree of Divorce provides that the parties shall freely and openly communicate regarding actions to be taken in the best interests of the children, that Plaintiff will forward copies of the children's school and medical records to the Defendant, including the children's report cards and parent-teacher notices.

28. That Plaintiff has not complied with those provisions since moving from Park City, Utah in 1992.

29. That during the spring of 1992 when Plaintiff sold her residence and made plans to leave Park City permanently, she did not advise Defendant of such plans in writing or otherwise nor did she advise Defendant that she was going to Boulder, Colorado to stay with Mr. Haynes nor to travel to New Zealand. Further, she failed to make any arrangements for the parties' children to visit with Defendant while she was out of state.

30. That Plaintiff traveled to New Zealand with the parties' children and stayed at her parents' residence. Defendant found out that Plaintiff had traveled to New Zealand and spoke with her by

telephone within minutes of her arrival. Defendant's subsequent telephone calls to learn of the whereabouts of his children were not accepted or no information about the children was given by Plaintiff or her parents to Defendant.

31. That Plaintiff while in New Zealand moved from her parents home to a friends home, but did not provide Defendant with a telephone number or other information so that visitation could be arranged. Similarly, Plaintiff's parents would not provide Defendant with a telephone number or other information about the whereabouts of Plaintiff or the minor children. Neither Plaintiff nor her parents were candid or forthcoming in providing information.

32. That Defendant was required to hire a private detective to locate his children and traveled to New Zealand where he remained for a period of approximately five weeks. Defendant hired counsel and instituted a proceeding in New Zealand relating to visitation with and custody of his children. The New Zealand court found that Plaintiff had not violated the Utah divorce decree for the reason that insufficient time had elapsed to establish whether Plaintiff would permit 60 days of visitation within the one year period of her having left the State of Utah during the summer of 1992. While mediation was attempted, Defendant, in the entire five week period while in New Zealand, saw his children on only one occasion in the presence of Plaintiff and Plaintiff's father for a

period of less than two hours even though requests for visitation were made continuously by Defendant.

33. That when Plaintiff moved to Boulder, Colorado with the children and later purchased a home in 1993 with Mr. Haynes, Defendant was only given a business telephone number (the only number available for a period of time) through which he could contact his children and Defendant became frustrated and angry when his calls met with answering machine messages and finally instructions from Mr. Haynes that the Defendant could only speak with his children two evenings each week at 7:00 p.m. Subsequently, a personal telephone line was obtained but Plaintiff was not candid or forthcoming in providing the number to Defendant.

34. That Defendant visited with the children in August 1992 on the east coast for a family reunion. Defendant and the minor children informed Plaintiff that the children would be returned late. Plaintiff should have consented to such since the request was reasonable and Defendant was not attempting to annoy Plaintiff. However, due to the animosity between the parties, Plaintiff would not consent to the additional days of visitation. Defendant was late returning the children from time to time although he informed Plaintiff of late returns due to weather conditions, plane schedules and other situations.

35. That Defendant, pursuant to a pre-arranged agreement with Plaintiff, traveled to Boulder, Colorado on December 20, 1993, to

visit with his children during the Christmas holiday between December 20 and 30, 1993.

36. That Plaintiff informed Defendant that he could pick up the children but he could do so only at a lot adjacent to a bank in Boulder, Colorado at 10:00 a.m. on December 20 and further that notwithstanding his objection to picking up the children in a commercial parking lot, he traveled to the appointed place and when the children were not present at the appointed time, called the residence of Plaintiff and Mr. Haynes from a mobile telephone.

37. That when there was no answer, he returned to his vehicle and was thereupon arrested and incarcerated based upon a telephone harassment complaint filed by Mr. Haynes with the knowledge of Plaintiff.

38. That Plaintiff did not deliver the children to the appointed place notwithstanding her agreement to do so and following the posting of bail by Defendant he was denied visitation with his children other than in the presence of a social worker in a supervised situation which he declined and thereafter returned to the State of Utah.

39. That Lindsay Sigg stated to Dr. Stewart her preference to live with her father and gave good reasons therefor, most of which related to her not caring for Mr. Haynes. Further, that the parties' child Nicola was less definite in her preference, but expressed problems she had with Mr. Haynes.

40. That since the divorce of the parties, Defendant has remarried and his current wife Amy has a daughter with whom the parties' minor children have a warm and comfortable relationship.

41. That the parties' minor children are doing well in school and there is no reason to believe that they would not continue to progress and achieve in the Park City school system with which the parties' oldest child is familiar and in which she was been enrolled.

42. That the children are closely bonded with each of their parents with the exception that tension has been created by Plaintiff because of her limiting or controlling the children's contact with Defendant and further that Defendant has made considerable sacrifices to be close to his children and was even willing to sell his businesses and move to their domicile, if necessary, in order to be with his children.

43. That the custody and visitation arrangements worked well during the first fifteen months following the parties' divorce, but deteriorated steadily since Plaintiff departed with the children to Colorado and New Zealand and she has failed to facilitate visitation with the children except on her terms which are not in their best interests.

44. That the children were born and raised in Park City, Utah, attended school and pre-school there and are generally acquainted and comfortable with their surroundings there.

45. That the environment offered by Defendant is a stable one with permanent employment, a satisfactory remarriage relationship and extended family and friends with whom the parties' minor children are acquainted.

46. That the findings in relationship to the legal factors to be considered as specified and detailed by Dr. Stewart are adopted herein as the findings of the Court and further that the recommendations that Dr. Stewart has made are well founded in fact.

47. That although Plaintiff has been an attentive mother who was not neglecting the minor children, and the minor children were generally doing well in her custody, it is in the best interests of the parties' minor children that custody be changed from Plaintiff to Defendant for the principal reason, among others, that Defendant will facilitate visitation between Plaintiff and the minor children whereas Plaintiff has a history of interfering with Defendant's visitation with the minor children. It is in the best interests of the minor children that a relationship with both parents be fostered. The probability of a healthy relationship being fostered with both parents will be enhanced if Defendant is the custodial parent. The change in custody should become effective July 1, 1994. There should be visitation that should be liberally granted by Defendant to Plaintiff which would include a significant summer visitation with Plaintiff.

48. That it is in the children's best interest that they should be enrolled in the Park City School District during the next academic year while residing with Defendant.

49. That the Court adopts the statutory visitation schedule but it is in the best interests that such visitation schedule be viewed as a minimum and that additional visitation be made available.

50. That it is in the children's best interest that they should have complete and open access to both parents by telephone and that all private telephone numbers should be given to the children and to the parties hereto.

51. That it is in the children's best interest that Victor Haynes be excluded from any involvement whatsoever in the relationship of the children with their father and that Mr. Haynes should not interfere with that relationship in any respect and that he should be so advised by Plaintiff.

Child Support

52. That based on the foregoing findings of fact determining that Defendant has overpaid Plaintiff $1,000.00 for alimony and should receive a credit in that amount against his child support obligation, the Court otherwise finds that Defendant is delinquent in his child support obligations under the Decree of Divorce and the Order and Judgment in the amount of $37.50 for February 1994, $688.00 for May 1994 and $668.00 for June 1994, which amounts should be offset against any amounts Plaintiff owes Defendant.

Further, Defendant owes Plaintiff $263.94 for various medical expense reimbursement which amount should be offset against any amounts Plaintiff owes Defendant.

53. That the parties have stipulated for purposes of this action, Plaintiff's gross monthly income is $2,800.00 and Defendant's gross monthly income is $4,333.00.

54. That pursuant to the Child Support Obligation Worksheet attached hereto as Exhibit A, child support is awarded to Defendant from Plaintiff in the amount of $466.00 per month for the two minor children commencing July 1, 1994, and continuing each month thereafter until a child attains the age of 18 years or graduates from high school, if later, or otherwise becomes emancipated, at which time child support shall cease for that child, and child support shall be recomputed for the remaining child.

55. That pursuant to Utah Code Ann. section 78-45-7.11, child support shall be reduced by fifty percent (50%) for each child for time periods during which Plaintiff has extended visitation with that child for at least 25 of 30 consecutive days.

56. That an immediate withhold an deliver order shall be entered pursuant to the provisions of Utah Code Ann. section 62A-11-401 et seq., relative to Plaintiff's child support obligation including an order assessing against Plaintiff an additional $7.00 per month as a check processing fee to be included in the amount withheld.

57. That the parties shall equally pay for one-half of all necessary and reasonable travel costs associated with the exercise of visitation.

58. That based on the foregoing findings of fact, the Court finds that a substantial change of circumstances has occurred and, accordingly, the Decree of Divorce and the Order and Judgment should be modified as set forth herein.

BASED upon the foregoing Findings of Fact, the Court now makes and adopts the following:

CONCLUSIONS OF LAW

1. That Plaintiff and Victor Haynes entered into a cohabitation arrangement as of the end of February 1993, and as such, no alimony is due or payable by the Defendant to the Plaintiff after the end of February 1993.

2. That Defendant should be given credit for alimony payments made for the months of March and April 1993 in the total amount of $1,000 against obligations, if any, he owes to Plaintiff.

3. That Defendant should be ordered to maintain medical insurance with a deductible of $1,000 but he should pay the first $750 of medical expenses annually for the care and treatment of the parties' minor children and that thereafter the parties shall bear all uninsured medical expenses equally.

4. That if Plaintiff can obtain medical insurance through her employment at a better or reduced rate, she shall do so.

5. That one-third of the day care expenses incurred by the Plaintiff of $1,425.00 are her sole responsibility and that the balance of $2,852.00 shall be assumed and paid by the parties equally.

6. That Plaintiff shall assume and pay the fees and costs and expenses incurred by the Defendant to Campbell Maack & Sessions in the amount of $9,302.48 through May 31, 1994, and such additional amounts as the Court may subsequently determine by affidavit submitted by Defendant's counsel.

7. That Plaintiff shall assume, pay and discharge the costs and expenses of Dr. Elizabeth Stewart in the total sum of $3,033.34 by reimbursing Defendant the amount of $2,683.34. Plaintiff has already paid Dr. Stewart the amount of $350.00.

8. That Plaintiff shall reimburse Defendant for costs incurred relative to the Boulder visitation on December 20, 1993, in the amount of $310.00, and further that Plaintiff shall pay Defendant's attorney's fees and costs in the defense of the criminal action initiated at the behest and insistence of Victor Haynes in the amount of $1,000.00.

9. That the parties shall bear their own costs and expenses including attorneys' fees incurred in connection herewith other than as hereinabove set forth.

10. That Victor Haynes should be excluded from any involvement or interference with the relationship of Defendant with the minor children and Plaintiff shall so advise him.

11. That the children should be provided complete and open access to both parents by telephone, that all private telephone numbers shall be given to the children and to the other party.

12. That there has been a significant change of circumstances with respect to the custody and visitation as previously ordered by the Court.

13. That there has been a flagrant disregard of the rights of Defendant by Plaintiff and no desire to be flexible, cooperative or supportive.

14. That the custody of the parties' minor children shall be changed from Plaintiff to Defendant as of July 1, 1994 and Plaintiff shall be awarded reasonable visitation rights with the parties' minor children to include at least a minimum the standard statutory visitation schedule.

15. That the children shall be enrolled in the Park City School District during the next academic year.

16. That Defendant is delinquent in his child support and medical reimbursement payments in the amounts of $1,413.50 and $263.94, which should be offset against amounts owed by Defendant to Plaintiff.

17. That Plaintiff shall pay to Defendant as and for child support the sum of $466.00 per month in accordance with the child support worksheet, a copy of which is attached hereto as Exhibit "A" commencing July 1, 1994.

18. That the Court shall make and enter its amendment to the Decree of Divorce accordingly.

DATED this 28th day of September 1994.

BY THE COURT:

DAVID S. YOUNG
District Judge

THIRD JUDICIAL DISTRICT COURT
SUMMIT
COUNTY
OF UTAH

APPROVED AS TO FORM:

KRUSE, LANDA & MAYCOCK

Ellen Maycock
Attorneys for Defendant

CAMPBELL MAACK & SESSIONS

Dean C. Andreasen
Attorneys for Plaintiff

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that on the 26th day of September, 1994, I caused the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to be hand-delivered to the following:

Ellen Maycock, Esq.
KRUSE, LANDA & MAYCOCK
Attorneys for Plaintiff
50 West 300 South, Suite 800
Salt Lake City, UT 84111

Donna Wall

000691

IN THE Third DISTRICT COURT
Summit COUNTY, STATE OF UTAH

yne Joan Sigg

vs.

Alfred Sigg

CHILD SUPPORT OBLIGATION WORKSHEET
(SOLE CUSTODY AND PATERNITY)

Civil No. 89-4310482

WARD CALCULATION	Mother	Father	Combined
mber of natural and adopted ildren of this mother and father.	//////////	//////////	2
ross monthly income.	$ 2800	$ 4333	//////////
reviously ordered alimony ctually paid.	- 0	- 0	//////////
reviously ordered child support.	- 0	- 0	//////////
ptional: Share of child support bligation for children in resent home.	- 0	- 0	//////////
justed Monthly Gross for child pport purposes.	$ 2800	$ 4333	$ 7133
se Combined Support ligation (both parents).	//////////	//////////	$ 1188
rcentage of COMBINED adjusted nthly gross.	39.25 %	60.75 %	//////////
ch parent's share of Base pport Obligation.	$ 466	$ 722	//////////
ildren's portion of monthly dical and dental insurance emiums paid to insurance company.	- 0	- 0	//////////
nthly work or training related ild care expense.	//////////	//////////	$ 0

BASE CHILD SUPPORT AWARD	$ 466
Adjusted Base Child Support Award.	$ 466
Adjusted Base Child Support Award per Child	$ 233
CHILD CARE AWARD WHEN ACTUALLY INCURRED	$ 0

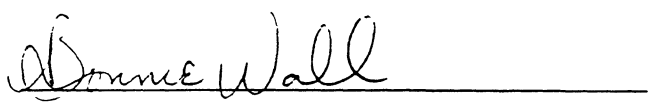
000692

EXHIBIT A

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that on the 26th day of September, 1994, I caused the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to be hand-delivered to the following:

Ellen Maycock, Esq.
KRUSE, LANDA & MAYCOCK
Attorneys for Plaintiff
50 West 300 South, Suite 800
Salt Lake City, UT 84111



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IN THE Third DISTRICT COURT
Summit COUNTY, STATE OF UTAH

Carolyne Joan Sigg ,
vs.
Henry Alfred Sigg ,

CHILD SUPPORT OBLIGATION WORKSHEET
(SOLE CUSTODY AND PATERNITY)

Civil No. 89-4310482

BASE AWARD CALCULATION	Mother	Father	Combined
1. Number of natural and adopted children of this mother and father.	//////////	//////////	2
2a. Gross monthly income.	$ 2800	$ 4333	//////////
2b. Previously ordered alimony actually paid.	- 0	- 0	//////////
2c. Previously ordered child support.	- 0	- 0	//////////
2d. Optional: Share of child support obligation for children in present home.	- 0	- 0	//////////
3. Adjusted Monthly Gross for child support purposes.	$ 2800	$ 4333	$ 7133
4. Base Combined Support obligation (both parents).	//////////	//////////	$ 1188
5. Percentage of COMBINED adjusted monthly gross.	39.25 %	60.75 %	//////////
6. Each parent's share of Base Support Obligation.	$ 466	$ 722	//////////
7. Children's portion of monthly medical and dental insurance premiums paid to insurance company.	- 0	- 0	//////////
8. Monthly work or training related child care expense.	//////////	//////////	$ 0

9. BASE CHILD SUPPORT AWARD	$ 466
10. Adjusted Base Child Support Award.	$ 466
11. Adjusted Base Child Support Award per Child	$ 233
12. CHILD CARE AWARD WHEN ACTUALLY INCURRED	$ 0

000692

EXHIBIT A

ADDENDUM

Exhibit "4" Amended Decree of Divorce, September 29, 1994

Clark W. Sessions (2914)
Dean C. Andreasen (3981)
CAMPBELL MAACK & SESSIONS
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201 South Main Street
Salt Lake City, Utah 84111-2215
Telephone (801) 537-5555

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

CAROLYNE JOAN SIGG, Plaintiff, vs. HENRY ALFRED SIGG, Defendant.	:	**AMENDED DECREE OF DIVORCE** Civil No. 10482 Judge David S. Young

Plaintiff's Order to Show Cause and Defendant's Verified Petition for Modification of Decree of Divorce and related matters came on regularly for trial before the Honorable David S. Young one of the Judges of the Court on June 14, and 15, 1994. Plaintiff was present and represented by Ellen Maycock, Esq. of Kruse, Landa & Maycock, her attorneys. Defendant was present and represented by Clark W. Sessions, Esq. and Dean C. Andreasen, Esq. of Campbell Maack & Sessions, his attorneys. On September 23, 1994, the Court heard argument from counsel for the parties on Plaintiff's Objections to Defendant's Proposed Findings of Fact, Conclusions of Law and Decree of Divorce. The Court having heretofore made and

entered its Findings of Fact and Conclusions of Law hereby orders, adjudges and decrees as follows:

1. Paragraphs 2, 3 and 4 of the Decree of Divorce entered on April 17, 1991 (the "Decree") and paragraph 6 of the Order and Judgment entered on September 24, 1991 (the "Order"), are hereby deleted and the following substituted therefore:

> That Defendant be and he is hereby awarded the permanent care, custody and control of the minor children of the parties and Plaintiff be and she is hereby awarded reasonable rights of visitation with the parties' minor children as the parties may agree but to include, at a minimum, the standard statutory visitation schedule, a copy of which is attached hereto as Exhibit "A." The parties' minor children should be provided complete and open access to both parties by telephone and all private telephone numbers shall be given to the children and to each of the parties and further that the parties minor children shall be enrolled in the Park City School District during the next academic year.
>
> That the parties shall freely and openly communicate regarding actions to be taken in the best interest of their children and shall have the right of access to school and medical records and to participate in parent/teacher conferences and regularly scheduled school

activities of the children. In the exercise of visitation rights the parties will take into consideration the children's schedules, commitments, needs and requirements and shall take no action to interfere in the enhancement of the other's relationship with the children nor pursue any action or conduct which is in any respect derogatory or demeaning toward the other parent in their relationship with their minor children.

Victor Haynes is excluded from any involvement or interference with the relationship of Defendant with the minor children and Plaintiff shall so advise him.

2. Paragraph 5 of the Decree of Divorce is deleted and the following substituted therefore:

Plaintiff shall pay to Defendant as child support the amount of Four Hundred Sixty Six Dollars ($466.00) per month for the two minor children commencing July 1, 1994, and continuing each month thereafter until a child attains the age of 18 years or graduates from high school, if later, or otherwise becomes emancipated, at which time child support shall cease for that child, and child support shall be recomputed for the remaining child.

Pursuant to Utah Code Ann. section 78-45-7.11, child support shall be reduced by fifty percent (50%) for each child for time periods during which Plaintiff has extended visitation with that child for at least 25 of 30 consecutive days.

Pursuant to Utah Code Ann. section 62A-11-401 et seq., an immediate withhold and deliver order shall be entered relative to Plaintiff's child support obligation including an order assessing against Plaintiff an additional $7.00 per month as a check processing fee to be included in the amount.

The parties shall equally pay for all necessary and reasonable travel costs associated with the exercise of visitation.

3. Paragraph 6 of the Decree and paragraph 3 of the Order are hereby deleted and the following substituted therefore:

That Defendant is hereby ordered to maintain medical insurance covering the parties' minor children during the period child support is payable hereunder with a deductible of $1,000.00 provided that Defendant is ordered to pay the first $750.00 of medical expenses annually for the care and treatment of the parties' minor children and that thereafter the parties are ordered to equally pay all uninsured medical expenses. In the event

Plaintiff is able to obtain medical insurance through her employment at a better or reduced rate, she is ordered to do so and in such event Defendant is ordered to insure the excess coverage.

4. Paragraphs 7 and 8 of the Decree are hereby deleted.

5. Paragraph 18 is added to the Decree as follows:

18. That Defendant is awarded judgment against Plaintiff for the amount of $10,192.38 calculated as follows and as may be augmented as provided herein: the amount of $1,000.00 constituting an overpayment of alimony for the months of March and April, 1993; legal fees and costs to Campbell Maack & Sessions through May 31, 1994 in the sum of $9,302.48 to be augmented as the Court may determine; fees of Dr. Elizabeth Stewart paid by Defendant in the amount of $2,683.34; the amount of $310.00 relative to Defendant's visit to Boulder, Colorado in December 1993; the attorney's fees charged by Michael Enwall in the amount of $1,000.00; less Defendant's share of work-related day care expenses of $1,426.00; less the amount of $1,413.50 for past due child support owed by Defendant; less the amount of $263.94 for medical reimbursement owed by Defendant.

6. Paragraph 19 is added to the Decree as follows:

19. That each of the parties shall bear their own costs and expenses incurred in this case including attorney's fees other than is hereinabove set forth.

That all other terms, provisions and conditions of the Decree of Divorce shall remain in full force and effect to the extent the same are not in conflict herewith.

DATED this 28th day of September 1994.

BY THE COURT:

DAVID S. YOUNG
District Judge

THIRD JUDICIAL DISTRICT COURT SUMMIT ★ COUNTY OF UTAH

APPROVED AS TO FORM:

KRUSE, LANDA & MAYCOCK

Ellen Maycock
Attorneys for Defendant

CAMPBELL MAACK & SESSIONS

Dean C. Andreasen
Attorneys for Plaintiff

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that on the 26th day of September 1994, I caused the foregoing Amended Decree of Divorce to be hand-delivered to the following:

Ellen Maycock, Esq.
KRUSE, LANDA & MAYCOCK
Attorneys for Plaintiff
50 West 300 South, Suite 800
Salt Lake City, UT 84111

Donnie Wall

U.C.A. SEC. 30-3-35 MINIMUM SCHEDULE FOR VISITATION

(Summarized)

Effective May 3, 1993

Reasonable Visitation should be defined as the parents may agree. If they are not able to agree, the definition for school-age children (beginning kindergarten) will be as follows:

Midweek: One weekday evening specified from 5:30 - 8:30 p.m.

Alternate Weekends: Friday 6:00 p.m. to Sunday 7:00 p.m.

Holidays take presedence over the weekend visitation and weekend schedule doesn't change.

Holidav Visitation: (6:00 p.m. day before holiday to 7:00 p.m. day of unless specified otherwise)

Odd Numbered Years	Even Numbered Years
Human Rights Day	New Year's Day
Easter from Fri. 6:00 p.m. to Sun 7:00 p.m.	President's Day
Memorial Day Fri. 6:00 p.m. to Mon. 7:00 p.m.	July 4th to 11:00 p.m.
July 24th to 11:00 p.m.	Labor Day from Fri. 6:00 to Mon. 7:00 p.m.
Veteran's Day	Columbus Day
Day before or after Child's Birthday 3:00 p.m. to 9:00 p.m.	UEA weekend from Wed. 6:00 p.m. to Sun. 7:00 p.m.
First Half Christmas Vacation, including Christmas Eve and Christmas Day to 1:00 p.m.	Child's Actual Birthday to 9:00 p.m.
	Thanksgiving from Wed 7:00 p.m. to Sun. 7:00 p.m.
	Second Half Christmas Vacation 1:00 p.m. to 9:00 p.m. Christmas Day

Father's Dav: With Father 9:00 a.m. to 7:00 p.m.

Mother's Dav: With Mother 9:00 a.m. to 7:00 p.m.

Summer: 4 weeks during summer or, if year round, 1/2 school breaks, custodial parent allowed two weeks uninterputed. Notification of summer visitation or vacation weeks with children should be provided in writing to the other parent at least 30 days in advance.

Telephone: Contact at reasonable hours

ADDENDUM

Exhibit "5" Judge's Ruling, June 15, 1994

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

* * *

Copy

CAROLYN JOAN SIGG,	)	
PLAINTIFF,	)	CIVIL NO. D-89-431-0482
-VS-	)	JUDGE'S RULING
HENRY SIGG,	)	
DEFENDANT.	)	

* * *

BE IT REMEMBERED THAT ON WEDNESDAY, THE 15TH DAY OF JUNE, 1994, COMMENCING AT THE HOUR OF 3:20 O'CLOCK P.M., THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE COURTROOM OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SUMMIT COUNTY, STATE OF UTAH; SAID CAUSE BEING HELD BY THE HONORABLE DAVID S. YOUNG, JUDGE IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH.

* * *

APPEARANCES

FOR THE PLAINTIFF: ELLEN MAYCOCK
KRUSE, LANDA & MAYCOCK
EIGHTH FLOOR, BANK TOWER
50 WEST BROADWAY
SALT LAKE CITY, UTAH 84101

FOR THE DEFENDANT: CLARK W. SESSIONS
CAMPBELL, MAACK & SESSIONS
ONE UTAH CENTER
THIRTEENTH FLOOR
201 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111

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INDEX

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P R O C E E D I N G S

JUDGE YOUNG: WELL, ALL RIGHT. I'VE HAD THE BENEFIT OF HEARING THE TESTIMONY OF THE PARTIES NOW FOR TWO DAYS AND I WANT TO MAKE A COUPLE OF PRELIMINARY COMMENTS PRIOR TO RULING.

I'VE ALREADY MADE THE COMMENT THAT I REALLY DO BELIEVE THAT BOTH OF YOU NEED TO HAVE THE ATTITUDE THAT YOU WANT THE CHILDREN TO HAVE AS GOOD A RELATIONSHIP WITH THE OTHER PARENT AS YOU REALLY WANT THEM TO HAVE WITH YOURSELF. AND THAT ATTITUDE CAN ONLY BE EXPRESSED THROUGH YOUR CONDUCT, THROUGH THE WAY YOU TREAT EACH OTHER, THROUGH THE WAY YOU DEAL WITH THE CHILDREN. AND UNLIKE ANY OTHER ORDER THAT A COURT EVER ENTERS, IF I ENTER A JUDGMENT AGAINST SOMEBODY IT IS A REAL AND FIXED ORDER. IT IS ESTABLISHED. BUT A CUSTODY ORDER, OR A VISITATION ORDER, IS CONSTANTLY SUBJECT TO CHANGE AND MODIFICATION. IT HAS TO BE DEALT WITH IN THE FUTURE. IT IS A PRESENT ORDER DEALING WITH FUTURE EVENTS. AND THE PROBLEM WITH IT IS THAT ALMOST NO MATTER WHAT I DECIDE, DEPENDING UPON HOW THE PARTIES WISH TO IMPLEMENT THE ORDER, IT WILL MAKE THE DECISION OF THE JUDGE RIGHT OR WRONG. IN OTHER WORDS, WHATEVER I DECIDE, IF YOU IMPLEMENT IT WELL, IT MAKES IT RIGHT; WHATEVER I DECIDE, IF YOU IMPLEMENT IT POORLY, IT MAKES IT WRONG.

NOW, IN 1991 THE DISTRICT COURT STATED THAT THE PLAINTIFF, THEN MS. SIGG, WAS AWARDED PERMANENT CARE,

CUSTODY AND CONTROL OF THE MINOR CHILDREN. NOW I'M AWARE THAT THAT ORDER WAS MODIFIED IN PART AS TO THE VISITATION WITH THE SUBSEQUENT ORDER, BUT THERE SHALL BE RESERVED IN THE DEFENDANT REASONABLE RIGHTS OF VISITATION WHICH WILL BE CONSISTENT WITH THOSE RIGHTS OF VISITATION WHICH HAVE BEEN EXERCISED BY THE DEFENDANT DURING THE PENDENCY OF THESE ACTIONS: EVERY OTHER WEEKEND, EVERY TUESDAY AND THURSDAY AND SO ON.

AND THEN IT TALKS ABOUT IN THE EVENT THE PLAINTIFF DETERMINES TO GO TO NEW ZEALAND.

THEN IT SAYS LATER THE DEFENDANT SHALL BE ENTITLED, IN THE EVENT THE PLAINTIFF DOES NOT MOVE OUTSIDE THE STATE OF UTAH, THE DEFENDANT SHALL BE ENTITLED TO FOUR WEEKS OF VISITATION DURING THE SUMMER FOR THE PURPOSE OF EXERCISING VACATION.

AND THEN IT SAYS THE PARTIES SHALL FREELY AND OPENLY COMMUNICATE REGARDING ACTIONS TO BE TAKEN IN THE BEST INTERESTS OF THE CHILDREN. THERE SHALL BE RESERVED IN THE DEFENDANT THE RIGHT TO RECEIVE AND REVIEW THE SCHOOLING AND ACADEMIC RECORDS OF THE CHILDREN, ALL MEDICAL AND DENTAL RECORDS AND ALL SOCIAL AND RELIGIOUS RECORDS OF IMPORTANCE. IN THOSE INSTANCES WHERE DUPLICATE RECORDS ARE NOT PROVIDED BY THE CHILDRENS' SCHOOL OR MEDICALS PROVIDED THE PLAINTIFF WILL FORWARD COPIES OF THOSE RECORDS TO THE DEFENDANT, SUCH AS THE CHILDRENS' REPORT CARDS, PARENT/

TEACHER NOTICES. THE DEFENDANT SHALL HAVE THE RIGHT OF ACCESS TO SCHOOL AND MEDICAL RECORDS AND SO ON.

WELL, IN THIS CASE THE COURT FINDS THAT THE PLAINTIFF HAS NOT CONTINUED TO ESTABLISH A HEALTHY PARENTAL RELATIONSHIP IN THE DEFENDANT, AND BY DOING THAT HAS CREATED SIGNIFICANT BARRIERS TO THE DEFENDANT EXERCISING HIS PARENTAL RIGHTS OF VISITATION.

LET ME GO THROUGH EACH ISSUE IN THE ORDER WHICH THEY WERE ARGUED.

FIRST IN RELATION TO THE ISSUE OF ALIMONY. THE COURT FINDS THAT THE PLAINTIFF AND MR. VIC HAYNES ENTERED INTO A COHABITATION RELATIONSHIP AS OF THE END OF FEBRUARY, 1993. THAT THEY, IN EFFECT, RESIDED TOGETHER THEREAFTER, EVEN THOUGH FOR SOME PERIOD OF TIME THEY HAD SEPARATE CONDOMINIUMS, THEY MAINTAINED AN ON-GOING SEXUAL RELATIONSHIP AS CANDIDLY ACKNOWLEDGED, THEY SHARED EXPENSES, THEY SHARED OPEN ACCESS TO EACH OTHER'S PROPERTY, TO EACH OTHER'S CONDOMINIUM AND LIVED AS THOUGH THEY MIGHT OTHERWISE HAVE BEEN HUSBAND AND WIFE. THEY SPENT TIME AT EACH OTHER'S CONDOMINIUMS, PRINCIPALLY AT HERS, HE CARRIED A KEY TO IT OR HAD ACCESS ALWAYS BY THE HIDDEN KEY. THEY ATE MEALS TOGETHER, THEY SHARED EXPENSES WITH FOOD, HE PARKED HIS CAR THERE ON OCCASION BUT HE WAS CLOSE ENOUGH TO OTHERWISE WALK THERE FROM HIS OWN CONDOMINIUM. SO THERE WILL BE NO ALIMONY DUE AFTER THE END OF FEBRUARY, 1993.

AS TO THE UNINSURED MEDICAL EXPENSES THE DIVORCE DECREE REQUIRES MR. SIGG TO MAINTAIN THE MEDICAL INSURANCE WITH A $250.00 DEDUCTIBLE. THAT'S WHAT THEY AGREED TO. ALL RIGHT NOW, THAT WAS THE DECREE. CERTAINLY, IF HE WISHES, HE CAN HAVE A $1,000.00 DEDUCTIBLE TO MAKE THE DIFFERENCE OR THE PREMIUM REDUCED BY A SUBSTANTIAL AMOUNT, AND HE SHALL PAY THE FIRST $750.00 SO THAT HE, IN ESSENCE, IS PAYING THE DEDUCTIBLE. ALL RIGHT? AND THEREAFTER THEY SHALL BEAR ALL UNINSURED MEDICAL EXPENSES EQUALLY.

NOW IF SHE CAN GET MEDICAL INSURANCE THROUGH HER EMPLOYMENT AT A BETTER OR REDUCED RATE SHE SHOULD DO THAT AND THE--IF IT IS AT NO EXPENSE SHE SHOULD DO THAT AND SAVE THE EXPENSE TO HIM. HE SHOULD THEN INSURE THE EXCESS COVERAGE. ALL RIGHT?

THE COURT FINDS AS TO THE DAY CARE COSTS THAT THE DAY CARE COSTS WERE NOT ALL INCURRED AS A LEGITIMATE COST OF DAY CARE FOR CARING FOR THE CHILDREN WHILE THE MOTHER WAS OTHERWISE WORKING, THAT MANY OF THE DECISIONS IN RELATION TO THE DAY CARE COSTS WERE REALLY NOT NECESSARY EVEN THOUGH I RECOGNIZE THAT SHE COULD NOT WORK AS FULLY OUT OF A HOME WITH THE CHILD PRESENT AS SHE MIGHT BE ENGAGED WITHOUT THE CHILD BEING PRESENT. NOW I HAVE NO GREAT BASIS TO DETERMINE UPON WHICH, HOW MUCH OF THIS SHOULD OR SHOULD NOT BE ALLOWED, AND SO I'M GOING TO MAKE A DECISION THAT ONE-THIRD OF THE AMOUNT IS TO BE THE MOTHER'S COSTS SOLELY, AND

THE PARTIES ARE TO DIVIDE THE REMAINDER. NOW, OF COURSE, I'M EXCLUDING FROM THAT THE MARGARET BRAAE COST WHICH I THINK WAS INAPPROPRIATE TO BE REQUESTED AND WAS DELETED BY THE PLAINTIFF IN HER OWN TESTIMONY. ALL RIGHT?

NOW AS TO THE FEES AND EXPENSES THAT HAVE BEEN INCURRED. THE COURT FINDS THAT THE DEFENDANT, MR. SIGG, WAS PLACED IN AN EXTRAORDINARILY DIFFICULT POSITION TO ASSERT HIS PARENTAL RIGHTS OF VISITATION AND THAT HE SHOULD NOT HAVE BEEN SO PLACED AND THAT THE MOTHER--THAT THAT CONDUCT WAS SO EXTREME IN THIS CASE THAT IT JUSTIFIES HAVING THE PLAINTIFF, MRS. SIGG, BEAR SOME OF HIS EXPENSES. ON EXHIBIT, DEFENDANT'S 2, THE COURT FINDS THAT ITEMS ONE AND TWO SHALL BE BORNE EXCLUSIVELY BY MR. SIGG AND ITEMS THREE AND FOUR SHALL BE BORNE EXCLUSIVELY BY MRS. SIGG. THAT IS, SHE SHALL PAY THE BOULDER CRIMINAL COSTS AND EXPENSES INCURRED OVER THERE, SHE SHALL PAY FOR THE PETITION TO MODIFY, THE ATTORNEY'S FEES OF MR. SESSIONS, WHICH IS THE AMOUNT OF $9,302.48.

NOW, MR. SESSIONS, I NOTE THAT SAYS THROUGH MAY 31ST. THERE MAY BE SOME ADDITIONAL AMOUNTS. I WILL ALLOW YOU TO SUBMIT TO ME AN AFFIDAVIT IN THAT REGARD AND I WILL DETERMINE WHETHER ADDITIONAL AMOUNTS SHOULD BE ADDED TO THAT.

MR. SESSIONS: WE WILL DO THAT.

JUDGE YOUNG: ALL RIGHT. THE WHOLE OF THE COST

OF ELIZABETH STEWART'S EXPENSE OF $2,900.00 PLUS HER TESTIMONY SHALL BE BORNE BY THE PLAINTIFF IN THIS CASE.

OTHER THAN THOSE FEES EACH SHALL BEAR THEIR OWN COSTS IN ADDITION THERETO.

NOW AS TO THIS ISSUE OF CUSTODY. OBVIOUSLY THIS IS THE MOST BURDENSOME ISSUE THAT A COURT DEALS WITH IN A CASE LIKE THIS AND IT IS PATHETIC THAT IT HAD TO COME BACK TO ME UNDER THESE CIRCUMSTANCES. AS A MATTER OF FACT, WHATEVER I DECIDE, LIKE I SAID EARLIER, IS GOING TO HAVE TO BE APPLIED HEREAFTER. IT DOESN'T START HERE BEFORE. IT'S HEREAFTER. THERE HAS TO BE A COMPLETE CHANGE OF HEART IN THE WAY THAT YOU EACH DEAL WITH EACH OTHER.

MR. HAYNES IS TO BE EXPRESSLY EXCLUDED, MS. SIGG, FROM ANY INVOLVEMENT WHATSOEVER. HE COULD BE ACCUSED OF CUSTODIAL INTERFERENCE SHOULD HE CONVERSE IN ANY RESPECT OR INTERFERE IN ANY RESPECT. AND SO HE SHOULD BE SO ADVISED OF THAT BY YOU. THAT DOESN'T MEAN THAT HE CAN'T ACCEPT A TELEPHONE CALL AND BE COURTEOUS, THAT DOESN'T MEAN THAT HE CAN'T REFER CALLS TO THE CHILDREN, AS HE SHOULD.

THE CHILDREN SHOULD HEREAFTER HAVE COMPLETE AND OPEN ACCESS TO BOTH PARENTS BY TELEPHONE. ALL PRIVATE NUMBERS SHOULD BE GIVEN TO THE CHILDREN AND TO THE OTHER PARTY. ANY NUMBERS IN YOUR RESPECTIVE RESIDENCES SHOULD ALWAYS BE KNOWN BY THE OTHER PARTY.

NOW EACH OF YOU IS EXPECTED TO ONLY MAKE

EMERGENCY CALLS AT UNUSUAL HOURS. IF THE CHILDREN ARE INJURED OR SOMETHING AND YOU HAVE TO MAKE A CALL AT 1:00 O'CLOCK IN THE MORNING YOU MAKE IT AT 1:00 O'CLOCK IN THE MORNING. BUT THAT IS ONLY AN EXTREME CIRCUMSTANCE; IT'S NOT A NORMAL CIRCUMSTANCE. CALLS SHOULD BE MADE AT NORMAL TIMES.

COURT FINDS THAT THERE HAS BEEN A SIGNIFICANT CHANGE OF CIRCUMSTANCES IN THIS CASE IN THE RELATIONSHIP BETWEEN THE PARTIES AS TO THE VISITATION. THE COURT HAS REVIEWED THE FINDINGS OF DR. STEWART AND HER RECOMMENDATIONS AND SPECIFICALLY ADOPTS THE FINDINGS IN RELATION TO THE LEGAL FACTORS TO BE CONSIDERED, ONE THROUGH FIVE THAT ARE WRITTEN ON PAGES THREE AND FOUR OF HER REPORT, AND ADOPTS REALLY ALL OF THE RECOMMENDATIONS THAT SHE HAS MADE AS THE COURT BELIEVES THAT THAT RECOMMENDATION IS WELL-FOUNDED IN FACT, THAT THERE HAS BEEN A FLAGRANT DISREGARD OF THE RIGHTS OF THE FATHER BY THE MOTHER IN THIS CASE AND A DESIRE TO NOT BE FLEXIBLE AS SHE TESTIFIED, TO NOT BE COOPERATIVE AS SHE TESTIFIED, TO NOT BE SUPPORTIVE AS SHE TESTIFIED. SHE SADLY MISSED THE MARK IN THAT REGARD.

AS A RESULT OF THAT THE COURT FINDS THAT THE CHILDREN SHOULD BE CHANGED IN THEIR CUSTODY FROM THE MOTHER TO THE FATHER AND THAT THERE SHOULD BE VISITATION THAT SHOULD BE LIBERALLY GRANTED BY THE FATHER TO THE MOTHER WHICH WOULD INCLUDE A SIGNIFICANT SUMMER VISITATION WITH

THE MOTHER THIS SUMMER, THAT THE CHILDREN SHOULD BE ENROLLED IN THE PARK CITY SCHOOL DISTRICT DURING THE NEXT ACADEMIC YEAR RESIDING WITH THE FATHER.

AND I'M GOING TO TELL YOU THAT I REALLY BELIEVE THAT BOTH OF YOU BETTER PUT BEHIND YOU THE BITTERNESS AND THE HOSTILITY AND BE WILLING HEREAFTER TO RECOGNIZE THAT IF THE CHILDREN SHOULD LIVE WITH THEIR MOTHER NEXT YEAR OR EVEN DURING THE YEAR, MR. SIGG, DON'T INVEST YOUR EMOTION TO THE DISADVANTAGE OF THE CHILDREN. LET THE CHANGE OCCUR AS IT OUGHT TO. CHILDREN CAN AND OUGHT TO AND USUALLY DO LIVE WITH OTHER PARENTS DURING THE COURSE OF THEIR YOUTH WHEN THERE IS A DIVORCE. THERE IS NO REASON TO THINK THAT THEY SHOULDN'T LIVE WITH THEIR FATHER FOR A SIGNIFICANT PERIOD OF TIME AND WITH THEIR MOTHER FOR A SIGNIFICANT PERIOD OF TIME HEREAFTER. BUT I EXPECT YOU TO WORK IT OUT.

THE VISITATION SCHEDULE INCORPORATED BY THE COMMISSIONERS OF THIS DISTRICT SHALL BE ADOPTED AS THE VISITATION SCHEDULE, BUT I DON'T BELIEVE THAT A SPECIFIC VISITATION SCHEDULE IS NECESSARY. I THINK YOU OUGHT TO VIEW THAT AS A MINIMUM AND YOU OUGHT TO BE PURSUING MUCH GREATER ACCESS TO BOTH PARENTS.

NOW I CAN'T TELL YOU HOW SAD I FEEL THAT THIS THING HAS HAD TO BE BROUGHT TO ME, BECAUSE FOR ME TO HAVE TO MAKE THIS DECISION RATHER THAN FOR YOU TO HAVE TO MAKE THIS DECISION SHOWS A SIGNIFICANT IMMATURITY AND A SAD

SITUATION FOR THESE TWO GIRLS WHO, I'M HEARTENED TO NOTE, HAVE BEEN VERY, VERY SUCCESSFUL IN THEIR OWN INDIVIDUAL MENTAL ATTITUDES, SCHOOL EXPERIENCE, ADJUSTMENTS.

NOW, MR. SESSIONS, I AM GOING TO ASK YOU TO PREPARE AN ORDER CONSISTENT. IS THERE ANYTHING LEFT THAT NEEDS TO BE DISCUSSED OR RESOLVED?

MR. SESSIONS: I KNOW OF NOTHING, YOUR HONOR.

JUDGE YOUNG: MS. MAYCOCK?

MS. MAYCOCK: I CAN'T THINK OF ANYTHING, YOUR HONOR.

JUDGE YOUNG: THANK YOU EACH. COURT'S IN RECESS.

MR. SESSIONS: THANK YOU.

MS. MAYCOCK: THANK YOU.

(WHEREUPON, THE JUDGE'S RULING WAS CONCLUDED).

* * *

C E R T I F I C A T E

STATE OF UTAH)
: SS.
COUNTY OF SALT LAKE)

I, EILEEN M. AMBROSE, HEREBY CERTIFY THAT I AM A CERTIFIED SHORTHAND REPORTER OF THE STATE OF UTAH; THAT AS SUCH CERTIFIED SHORTHAND REPORTER, I ATTENDED THE HEARING OF THE ABOVE-MENTIONED MATTER AT THAT TIME AND PLACE SET OUT HEREIN; THAT THEREAT I TOOK DOWN IN SHORTHAND THE TESTIMONY GIVEN AND THE PROCEEDINGS HAD THEREIN; AND THAT THEREAFTER I TRANSCRIBED MY SAID SHORTHAND NOTES INTO TYPEWRITING, AND THAT THE FOREGOING TRANSCRIPTION IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE SAME.

Eileen M. Ambrose C.S.R.
EILEEN M. AMBROSE, C.S.R.

MY COMMISSION EXPIRES:
JANUARY 14TH, 1996